76-1088
No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL TRADE COMMISSION, PETITIONER

v.

BENEFICIAL CORPORATION AND
BENEFICIAL MANAGEMENT CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS

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The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the Third Circuit that set aside the first paragraph of the Commission's order.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-30a) is reported at 542 F.2d 611. The decision (App. D, *infra*, pp. 35a-140a) and order (App. E, *infra*, pp. 141a-145a) of the Federal Trade Commission are reported at 86 F.T.C. 119.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 31a-32a) was entered on September 8, 1976, and modified on September 28, 1976 (App. C, *infra*, pp. 33a-34a). On November 27, 1976, Mr. Justice Brennan extended the time to file a petition for a writ of certiorari to and including February 5, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals applied an erroneous standard of judicial review of remedies of administrative agencies when it set aside an order of the Federal Trade Commission prohibiting the use of a deceptive advertising slogan, where the order rested on the Commission's considered judgment that qualifying language or anything less than elimination of the deceptive slogan would not adequately protect the public.

STATUTE INVOLVED

Section 5(a) and (b) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(a) and (b), provided in pertinent part:[1]

[1] After the complaint issued in this case, Section 5(a) and (b) were amended by adding the words "or affecting" before commerce and by the renumbering of paragraph (a)(6) as paragraph (a)(2). 88 Stat. 2193, 89 Stat. 801, 15 U.S.C. (Supp. V) 45(a)(1), (2).

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * * * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it * * * shall issue * * * an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

STATEMENT

In 1969 respondent Beneficial Corporation,[2] which was in the consumer loan business, established an income tax preparation service (App. D, *infra*, p. 35a). Beneficial then began to advertise what it called an "instant tax refund" with commercials and print advertisements which ran during the early months of each year[3] (*id.* at 43a-45a, 90a). The "instant tax

[2] Both Beneficial Corporation and its wholly-owned subsidiary, Beneficial Management Corporation, petitioned for judicial review of the Commission's order. They are referred to here collectively as Beneficial. Beneficial Corporation is the parent of some 1,500 separately incorporated local loan offices known as the Beneficial Finance System. (App. D, *infra*, p. 37a.)

[3] Beneficial's 1969 and early 1970 advertising used texts such as the following:

[Footnote continued on page 4]

refund" was in fact Beneficial's ordinary consumer loan service and was entirely unrelated to tax refunds (*id.* at 45a). Although Beneficial made a series of modifications (see p. 3, n. 3, *supra*), this advertising campaign continued to focus on the "instant tax refund" theme despite Beneficial's awareness that it was being misinterpreted by consumers.

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[3] [Continued]

> Do you have a refund coming to you on your income taxes this year? Well, there's no need to wait weeks for your refund check. Get the money right now—even before you mail your return—with a cash advance from Beneficial. We call it the Instant Tax Refund, a special service of Beneficial Finance. Instant Tax Refund. At Beneficial you're good for more * * *. [App. A, *infra*, p. 5a.]

By February 1970, Beneficial had changed its advertisements in response to confusion that had developed concerning the nature of the "instant tax refund" service (Apps. A and D, *infra*, pp. 5a, 44a). Beneficial continued to modify its advertising, so that, by 1973, Beneficial's typical radio and television advertisement was:

> ANNCR: This year, have your taxes prepared a better way * * *
>
> SINGERS: At Beneficial (toot, toot) * * *
>
> ANNCR: at Beneficial Finance. Beneficial's Income Tax Service does your taxes by computer * * * for as little as five dollars. And listen to Beneficial's "Instant Tax Refund" Plan: if you have a refund coming, you don't have to wait weeks for a Government check. The instant you qualify for a loan, Beneficial will lend you the equivalent of your refund, in cash, instantly. It's the "Instant Tax Refund" Plan * * * at Beneficial Finance. The place to have your taxes done this year. [App. A, *infra*, pp. 5a-6a.]

In April 1973, the Federal Trade Commission issued an administrative complaint against Beneficial, charging that the Commission had reason to believe that the "instant tax refund" advertising was an unfair and deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act.[4] Beneficial conceded, and the Commission and the Administrative Law Judge found, that the "instant tax refund" advertised by Beneficial was only Beneficial's ordinary consumer loan service, with normal finance charges and repayment period, and was unrelated to tax refunds or the customer's use of Beneficial's tax preparation service (App. A, *infra*, p. 4a). Neither a customer's eligibility for a tax refund, nor the amount of any refund to which he might be entitled, affected either his eligibility for or the amount or terms of, a loan, both of which depended entirely on his meeting Beneficial's ordinary credit standards. (App. D, *infra*, p. 45a.) The Commission further found that the use of the words "instant tax refund," in even the most modified form of Beneficial's advertising, had the capacity and ten-

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[4] The complaint also alleged that other Beneficial practices violated Section 5, including misuse of information provided by its tax service customers, and misrepresentations concerning its reimbursement policy, its competence to prepare tax returns, and the number of customers for whom it had secured refunds. Beneficial consented to entry of an order prohibiting some of these practices (App. D, *infra*, p. 36a). The Commission found that Beneficial had misused tax information its customers provided and barred such misuse; the court of appeals upheld that determination (App. A, *infra*, pp. 21a-24a) and it is no longer in issue.

dency to mislead the public about the true nature of Beneficial's loan offer, in violation of Section 5 of the Act (Apps. A and D, *infra*, pp. 6a, 47a-48a).[5]

Both the Administrative Law Judge and the Commission considered at some length the possibility of permitting Beneficial to continue to use the slogan with explanatory language, including that proffered by Beneficial, but concluded that qualifying language could not cure the deception inherent in Beneficial's use of the words "instant tax refund" (App. D, *infra*, pp. 54a-55a, 110a-112a, 132a-134a). The Commission explained (App. D, *infra*, pp. 54a-55a):

> In fact, since its inception in 1969, the Instant Tax Refund phrase has deceived continuously, and Beneficial's repeated efforts to explain it have not cured the false impression it leaves. Beneficial's inability to remedy the deception, which persists even in the qualifying phrase it offers on this appeal as a settlement, confirms what we believe to be obvious. No brief language is equal to the task of explaining the

[5] As the Commission found, the record demonstrated that customers had in fact been substantially misled by Beneficial's advertising. For example, a report from Beneficial's advertising agency stated: "Many [customers] thought they could simply get their government checks immediately at Beneficial. * * * There were many loud arguments and unpleasantnesses * * * including one or two incidents of violence being threatened" (App. D, *infra*, p. 49a). Even after Beneficial modified its advertising to include references to a loan, consumers testified that their "impression was that they would pay only a small fee and that the main qualification for the Instant Tax Refund was being due an actual Government refund" (App. D, *infra*, p. 52a).

> Instant Tax Refund slogan, for the phrase is inherently contradictory to the truth of Beneficial's offer. In truth, the Instant Tax Refund is not a refund at all, but only Beneficial's everyday loan service, complete with normal finance charges and credit checks; nor is it in the least related to any tax refunds, for the size of the loan Beneficial wishes to sell is geared to the customer's credit limit instead of his government refund and many people due a government refund do not qualify for an Instant Tax Refund loan at all; moreover, depending on the season of the year or the customer's sales resistance, the Instant Tax Refund may be called a Vacation loan, a Taxpayer loan, or a Bill Consolidation loan.

Accordingly, the Commission ordered Beneficial to cease and desist from "[u]sing the term 'instant tax refund,' or any other word or words of similar import or meaning" in advertising its consumer loan business (App. D, *infra*, p. 137a).[6]

The court of appeals upheld the Commission's finding that Beneficial's advertising, even in its most qualified form, was deceptive (App. A, *infra*, p. 15a). The court, however, set aside that portion of the Commission's order which prohibited use of the slogan "instant tax refund" or words of similar import.

[6] The Commission noted that if Beneficial began offering a loan service actually related to income tax refunds, it could seek to reopen the order (App. D, *infra*, p. 55a). See 15 U.S.C. 45(b).

The court noted the Commission's determination that no qualifying language could adequately dispel the deception inherent in Beneficial's use of the phrase "instant tax refund" (App. A, *infra*, p. 19a), but stated that "[w]e do not believe" that certain examples of advertisements (which the court, but not Beneficial, suggested) would be deceptive[7] (App. A, *infra*, p. 19a). The court concluded that the Commission had "exceeded its remedial authority" because it failed "to consider fully the feasibility of requiring merely that advertising copy be rewritten in lieu of total excision of the offending language * * *" (App. A, *infra*, p. 19a), and remanded the case "for further proceedings consistent with * * * this opinion" (App. A, *infra*, p. 24a).

Recognizing that it was establishing a new standard of judicial review, the court stated (App. A, *infra*, p. 17a):

> We acknowledge of course, that we are ordinarily obliged to defer broadly to the Commission's exercise of informed discretion in framing remedial orders that bear some rational relationship to the removal or prevention of an established violation. * * * But we are dealing in this case with the government regulation of a form of speech. The first amendment requires, we believe, an examination of the Commission's action that is more searching than in other contexts.

[7] The examples of permissible advertisements were as follows:

> Beneficial's everyday loan service can provide to regularly qualified borrowers an Instant Tax Refund Anticipation Loan whether or not the borrower uses our tax service.
>
> or
>
> Beneficial's everyday loan service can provide to any regularly qualified borrower an instant loan in anticipation of his tax refund. We call it an instant Tax Refund Anticipation Loan. [App. A, *infra*, p. 19a.]

The court concluded that this result was compelled by *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, and *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, which it read as establishing what has become a "constitutional principle" that the Commission cannot require excision of a misleading trade name or advertising slogan unless it determines that a narrower remedy would be inadequate to correct the deception (App. A, *infra*, p. 20a).

Judge Van Dusen, dissenting, noted that the Commission had already fairly considered and rejected a limited remedy, and concluded that neither the First Amendment nor decisions under the Act require more (App. A, *infra*, pp. 28a-30a).

REASONS FOR GRANTING THE PETITION

1. This Court repeatedly has emphasized the broad discretion of the Commission in formulating appropriate remedies to deal with unfair and deceptive acts and practices and the limited scope of judicial review of those orders. "The Commission has wide discretion in its choice of a remedy deemed adequate to

cope with the unlawful practices in this area of trade and commerce. * * * [J]udicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. * * * The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist" (*Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611-613; footnote omitted). See, also, *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-395; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-429; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473.

The Court in *Siegel* also held that these principles apply to the issue in this case, namely, "whether the Commission abused its discretion in concluding that no change 'short of the excision' of the [deceptive advertising slogan] would give adequate protection. *Federal Trade Commission* v. *Algoma Lumber Co.*, [291 U.S. 67] pp. 81-82" (327 U.S. at 612).

Under these principles, the court of appeals should have upheld the Commission's order prohibiting respondent from using the advertising slogan "instant tax refund" or similar words. Where the Commission finds that a trade name (and, *a fortiori*, an advertising slogan) is inherently so deceptive that no qualifying language would be adequate to correct the deception, it may prohibit use of the misleading language altogether. Thus, in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, this Court upheld a Commission order prohibiting the use of the words "California white pine" on lumber that was botanically yellow pine. Similarly, in *Resort Car Rental System, Inc.* v. *Federal Trade Commission*, 518 F. 2d 962 (C.A. 9), the court sustained the Commission's ban of the trade name "Dollar-A-Day" by rental agencies that did not, in fact, offer automobiles for rent at a dollar per day.[8]

The Commission explicitly considered whether something less than elimination of the deceptive phrase would suffice to protect the public, but justifiably concluded that any lesser remedy would be inadequate. As the Commission explained (App. D, *infra*, pp. 54a-55a), "the phrase is inherently contradictory to the truth of Beneficial's offer," since "the Instant Tax Refund is not a refund at all, but only Beneficial's everyday loan service, complete with normal finance charges and credit checks; nor is it in the least related to any tax refunds, for the size of the loan Beneficial wishes to sell is geared to the customer's credit limit instead of his government refund and many people due a government refund do not qualify

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[8] See, also, *Bakers Franchise Corp.* v. *Federal Trade Commission*, 302 F. 2d 258, 262 (C.A. 3); *Carter Products, Inc.* v. *Federal Trade Commission*, 268 F. 2d 461, 498 (C.A. 9), certiorari denied, 361 U.S. 884; *United States Navy Weekly, Inc.* v. *Federal Trade Commission*, 207 F. 2d 17, 18 (C.A. D.C.); *Federal Trade Commission* v. *Army and Navy Trading Co.*, 88 F. 2d 776 (C.A.D.C.).

for an Instant Tax Refund loan at all * * *." The inherently deceptive character of Beneficial's use of the words is confirmed by the fact that Beneficial itself was unable to change the wording of the advertisements so as to dispel the confusion and misunderstanding the words had created among Beneficial's customers. (See the Statement, *supra*, pp. 4, 6).

Since, as Beneficial conceded and the Commission found, Beneficial's "instant tax refund" loan has no relationship to whether a customer is entitled to a tax refund but is "only Beneficial's everyday loan service" to which Beneficial applies its normal standards for making loans, the Commission reasonably concluded that any use of those words necessarily is inherently deceptive. For no matter how the words may be qualified, they present a false concept: that the availability of a Beneficial loan is related to a customer's right to a tax refund. The only function those words could serve would be to fool customers into thinking that their prospects for obtaining a loan were enhanced if they had a tax refund coming, which in fact is not the case.[9]

The present case is therefore significantly different from *Siegel*, *supra*, and *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, upon which the

[9] The two advertisements that the court of appeals suggested would not be deceptive (App. A, *infra*, p. 19a) are subject to the same infirmity. Both of them permit use of the words "Instant Tax Refund Anticipation Loan" even though the availability of the loan has nothing to do with any possible tax refund and eligibility for a refund does not expedite or improve chances for obtaining a loan.

court of appeals relied (App. A, *infra*, pp. 18a-20a). In each of those cases, this Court set aside a Commission order requiring the elimination of a trade name. In both cases, however, the rationale was that the agency had not considered whether something less than elimination of the offending name would cure the deception. As the Court explained in *Siegel*, where it remanded to the agency a Commission order prohibiting the use of the trade name "Alpacuna" on coats containing no vicuna, "we are left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate. Yet that is the test, as the *Algoma Lumber Co.* and the *Royal Milling Co.* cases indicate" (327 U.S. at 613).[10]

Here, in contrast, the Commission fully examined the question "whether some change of [the slogan] short of excision would * * * be adequate," and justifiably concluded that it would not. In so ruling, the Commission "made an allowable judgment in its choice of the remedy" and the court of appeals should not have "interfere[d]" by substituting its judgment for that of the agency that "no change 'short of excision,'" would give adequate protection (*Siegel*, *supra*, 327 U.S. at 612-613).

[10] In *Royal Milling*, this Court held that the Commission had gone "too far" in prohibiting the use of trade names containing the word "milling," which the Commission found was deceptive because the companies did no milling; the Court stated that requiring qualifying language indicating that the companies do not grind grain would suffice (288 U.S. at 217-218). *Siegel*, however, also involved a deceptive trade name,

2. The court of appeals was of the view, however, that different principles govern the authority of the Commission to frame remedial orders and the scope of judicial review of those orders when the order involves "government regulation of a form of speech" (App. A, *infra*, p. 17a). Although recognizing "that we are ordinarily obliged to defer broadly to the Commission's exercise of informed discretion in framing remedial orders that bear some rational relationship to the removal or prevention of an established violation," the court concluded that "[t]he first amend-

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and the Court there recognized the broad discretion of the Commission to decide whether excision of the deceptive trade name was necessary to protect the public. Indeed, as noted, in *Siegel* the Court remanded the case to the agency to determine "whether some change of name short of excision would in the judgment of the Commission be adequate." (327 U.S. at 613). *Siegel* thus itself recognizes that the Commission has the authority to require excision of a trade name where necessary, a principle which it stated both *Royal Milling* and *Algoma Lumber* (see, *supra*, p. 13) recognize.

However, assuming *arguendo* that *Royal Milling* does limit the Commission's authority to prohibit use of deceptive trade names, the agency properly declined to extend that decision to advertising slogans (App. D, *infra*, p. 54a, n. 6). There are significant differences between trade names and mere advertising slogans that justify giving the Commission broader authority to deal with the latter. A trade name identifies a business or product in the mind of the public and its excision necessarily eliminates whatever good will that name has developed. An advertising slogan, on the other hand, ordinarily relates only to the qualities and characteristics of a particular product and frequently is used for only brief periods. The impact upon a company of prohibiting a particular advertising slogan ordinarily will be far less than prohibiting use of a trade name.

ment requires, we believe, an examination of the Commission's action that is more searching than in other contexts"; and that the recent decisions of this Court holding that the First Amendment protects commercial speech [11] "mean that the remedy for the perceived violation can go no further in imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective of preventing the violation" (App. A, *infra*, pp. 17a-18a).

Even under that standard, however, the court of appeals should have sustained the Commission's order. The Commission did not here "go * * * further * * * than is reasonably necessary to accomplish the remedial objective of preventing the violation" in requiring excision of the advertising slogan "instant tax refund," since it justifiably concluded that anything less would not correct the inherently deceptive character of that slogan and its inevitable consequence of misleading and deceiving the public.

In any event, this Court's decisions that the First Amendment protects commercial speech do not limit the Commission's power effectively to prevent deception accomplished through such speech or change the scope of judicial review of Commission orders. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, the Court noted that commercial speech is distinguishable from

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[11] *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748; *Bigelow* v. *Virginia*, 421 U.S. 809.

other forms of speech (*id.* at 771, n. 24) and that the First Amendment does not bar effective regulation of false, misleading or deceptive advertising (*id.* at 771-772; footnote omitted):

> Untruthful speech, commercial or otherwise, has never been protected for its own sake. * * * Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

See, also, *Young* v. *American Mini Theatres, Inc.*, No. 75-312, decided June 24, 1976, slip op. 18, n. 31: "The power of the Federal Trade Commission to restrain misleading, as well as false, statements in labels and advertisements has long been recognized."

3. The issue is important in the Commission's administration of the Federal Trade Commission Act. A major portion of the Commission's work under the Act involves the elimination and prevention of false and misleading advertising. Those objectives cannot be achieved unless the agency has authority effectively to deal with such advertising, which may require the elimination of deceptive language where necessary to protect the public. The restrictions that the court of appeals' decision imposes upon the Commission's ability to frame effective remedies in such cases and the expanding role of the courts in reviewing those

orders which that decision presages would seriously handicap the agency's ability properly to perform its duties in this important aspect of its work.[12]

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[12] Although the court of appeals stated that the Commission had improperly failed "to consider fully the feasibility of requiring merely that advertising copy be rewritten in lieu of total excision of the offending language" (App. A, *infra*, p. 19a), it remanded the case "for further proceedings consistent with * * * this opinion" (*id.* at 24a). The opinion leaves little doubt that in the court's view the Commission could not prohibit Beneficial from using the advertising slogan "instant tax refund," but was limited to requiring the use of qualifying language. Indeed, the court itself proposed two suggested advertisements containing qualifying language which it did "not believe" would be deceptive (*id.* at 19a). The opinion did not merely remand the case to the agency to consider anew whether something less than excision of the slogan would be adequate to correct the deception; the Commission already had considered that issue and concluded that a lesser remedy would not suffice. Accordingly, the issue presented in this petition is now ripe for review by this Court, despite the court of appeals' remand of the case to the agency for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 75-2102

BENEFICIAL CORPORATION, a Delaware corporation, and BENEFICIAL MANAGEMENT CORPORATION, a Delaware corporation, PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

(Federal Trade Commission No. 8922)

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

Argued June 8, 1976

Before VAN DUSEN, GIBBONS and ROSENN,
Circuit Judges

OPINION OF THE COURT

(Filed Sep. 8, 1976)

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GIBBONS, Circuit Judge

We here consider a petition for review of a final order of the Federal Trade Commission, filed pursuant to 15 U.S.C. § 45(c). The order directed the petitioner Beneficial Corporation to cease and desist from certain practices in connection with its loan and tax preparation businesses.[1] Beneficial challenges both the Commission's violation determinations and the breadth of its remedy. We enforce the Commission's order in part, but vacate and remand in part because we conclude that the order is overbroad in one respect.

I. The Commission Proceedings

On April 10, 1973, the Federal Trade Commission filed a complaint charging Beneficial with unfair and deceptive trade practices in connection with the preparation of income tax returns and the making of consumer loans in the loan offices of the Beneficial Finance System, in violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Beneficial, through 1400 branches operated by wholly-owned subsidiaries comprising the Beneficial Finance System, engaged in the business of making loans to

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[1] The petitioners are Beneficial Corporation and Beneficial Management Corporation, both of which are corporations incorporated under the laws of Delaware with their principal places of business in Delaware and New Jersey, respectively. The loan offices in the Beneficial Finance System are operated by subsidiaries of Beneficial Corporation. Both of the petitioners will be referred to collectively as "Beneficial".

members of the public based on their credit-worthiness. In the spring of 1969 Beneficial decided to go into the business of income tax return preparation. Because of developments in computer technology, Beneficial's loan officers were able to gather the information necessary for a computer to prepare tax returns accurately and at reasonable cost. The decision to enter the tax return preparation business was based on the belief that customers for the service who needed funds to pay the tax found to be due would find it convenient to borrow such funds from Beneficial. It soon became apparent, however, that most such customers would actually receive tax refunds. Beneficial decided to advertise a loan providing for an immediate use of money in anticipation of the tax refund, thus eliminating the wait for a refund check from the government. The Commission and Beneficial agreed that the tax refund loan is nothing other than Beneficial's usual loan service, based on the credit-worthiness of the borrower as to which the anticipated tax refund may have no bearing. The parties differed on (1) whether the advertising of the loan deceived customers as to its nature, and (2) whether Beneficial improperly used the tax information it obtained in its tax return preparation service to solicit customers for loans. After an evidentiary hearing an administrative law judge on October 21, 1974, found Beneficial to be in violation in both respects. The Commission affirmed this decision on July 15, 1975, and entered a cease and desist order which, among other things, prohibited Beneficial from using in its copyrighted advertising the term "'instant tax refund,' or any other word or words of similar import or meaning," and from using customer tax information in loan solicitations except under prescribed conditions.

The evidence before the administrative law judge established that Beneficial's 1969 and early 1970 advertising typically used a text such as the following:

> "Do you have a refund coming to you on your income taxes this year? Well, there's no need to wait weeks for your refund check. Get the money right now—even before you mail your return—with a cash advance from Beneficial. We call it the Instant Tax Refund, a special service of Beneficial Finance. Instant Tax Refund. At Beneficial you're good for more. . . ."

By February 1970 Beneficial added a reference to a loan, and to the fact that the customer would have to qualify for that loan. There were additional modifications and qualifications with the result that Beneficial's radio and television advertisements at the time of the Commission's order typically were like the following:

> "ANNCR: This year, have your taxes prepared a better way . . .
> SINGERS: At Beneficial (toot, toot) . . .
> ANNCR: At Beneficial Finance. Beneficial's Income Tax Service does your taxes by computer . . . for as little as five dollars. And listen to Beneficial's 'Instant Tax Refund' Plan: if you have a refund coming, you don't have to wait weeks for a Government check. The instant you

> qualify for a loan, Beneficial will lend you the equivalent of your refund, in cash, instantly. It's the 'Instant Tax Refund' Plan . . . at Beneficial Finance. The place to have your taxes done this year."

The Commission concluded that both the original advertising and the modified copy were false and misleading, and that the proper remedy was a total prohibition against the use of the copyrighted terms "Instant Tax Refund Plan" or "Instant Tax Refund Loan", no matter how qualified by the preceding or following text.

The evidence before the administrative law judge also established that from late 1969, when it started its tax return preparation business, until December 1971, Beneficial routinely used information obtained from its tax return customers for the purpose of soliciting loans. Indeed, the generation of loan business was the principal motivation underlying the decision to expand into the tax return preparation business. On December 10, 1971, § 316 of the Revenue Act of 1971, 26 U.S.C. § 7216, was enacted, effective January 1, 1972. Subject to exceptions not material here, § 7216(a) provides

> General rule.—Any person who is engaged in the business of preparing, or providing services in connection with the preparation of returns of the tax imposed by chapter 1, or declarations or amended declarations of estimated tax under section 6015, or any person who for compensation prepares any such return or declaration for any other person, and who—

> (1) discloses any information furnished to him for, or in connection with, the preparation of any such return or declaration, or
>
> (2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return or declaration,
>
> shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

This statute establishes a general prohibition against the disclosure or use for non-tax purposes of tax information gathered by a tax preparer like Beneficial. Treasury regulations adopted in 1974 under the authority of § 7216(b)(3), however, permit [2] the

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[2] (a) Written consent to use or disclosure—(1) Solicitation of other business. (i) If a tax return preparer has obtained from the taxpayer a consent described in paragraph (b) of this section, he may use the tax return information of such taxpayer to solicit from the taxpayer any additional current business, in matters not related to the Internal Revenue Service, which the tax return preparer provides and offers to the public. The request for such consent may not be made later than the time the taxpayer receives his completed tax return from the tax return preparer. If the request is not granted, no follow up request may be made. This authorization to use the tax return information of the taxpayer does not apply, however, for purposes of facilitating the solicitation of the taxpayer's use of any services or facilities furnished by a person other than the tax return preparer, unless such other person and the tax return preparer are members of the same affiliated group within the meaning of section 1504. Thus, for example, the authorization would

use of such information with the customer's written consent.[3] The new law compelled Beneficial to alter

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not apply if the other person is a corporation which is not affiliated with the tax return preparer within the meaning of section 1504(a). Moreover, this authorization does not apply for purposes of facilitating the solicitation of additional business to be furnished at some indefinite time in the future, as, for example, the future sale of mutual fund shares or life insurance, or the furnishing of future credit card services. It is not necessary, however, that the additional business be furnished in the same locality in which the tax return information is furnished.

Treas. Reg. § 301.7216-3(a) (1974).

[3] The form of consent is specified and illustrated in Treas. Reg. § 301.7216-3(b)-(c) (1974):

(b) Form of consent. A separate written consent, signed by the taxpayer or his duly authorized agent or fiduciary, must be obtained for each separate use or disclosure authorized in paragraph (a)(1), (2) or (3) of this section and shall contain—

(1) The name of the tax return preparer,

(2) The name of the taxpayer,

(3) The purpose for which the consent is being furnished,

(4) The dates on which such consent is signed,

(5) A statement that the tax return information may not be disclosed or used by the tax return preparer for any purpose (not otherwise permitted under § 301.7216-2) other than that stated in the consent, and

(6) A statement by the taxpayer, or his agent or fiduciary, that he consents to the disclosure of use of such information for the purpose described in subparagraph (3) of this paragraph.

(c) Illustrations. The application of this section may be illustrated by the following examples:

Example (1). In order to stimulate the making of loans, a bank advertises that it is in the business of

its solicitation practices. In attempting to comply with the requirements, Beneficial adopted a Form BOR-56, reproduced in the margin in its entirety,[4]

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preparing tax returns. A taxpayer goes to the bank to have his tax return prepared. After the return has been completed by the bank, the employee of the bank who obtained the tax return information from the taxpayer explains that the taxpayer owes an additional $400 in taxes and that the bank's loan department may be able to offer the taxpayer a loan to pay the tax due. If the taxpayer decides to accept the opportunity offered to apply for a loan, the bank must first have the taxpayer execute a written consent described in paragraph (b) of this section for the bank to use any of such information which is required in determining whether to make the tax loan.

[4]

AUTHORIZATION

TO

I hereby authorize and request you to use my name and address for the purpose of soliciting me in connection with any business in which you or your associated companies or affiliated corporations may engage. Furthermore, I acknowledge that this and any other information which may appear in any loan or finance application by me or on my behalf or in any loan or finance statement or information form, given in connection therewith, was not given to you for the purpose of preparing any tax return on my behalf.

Dated: _____

_____

Signature

_____

Name (Print)

_____

Address

_____

City State Zip

and required that its loan officers first procure a tax return customer's signature on that form before soliciting the customer for a loan. The Commission held that the pre-1972 use of tax information for loan solicitations was an unfair and deceptive trade practice amounting to an abuse of a confidential relationship, in violation of § 5. It also held that Form BOR-56 was inadequate as an informed consent. Without deciding whether Beneficial's present practices violated the Revenue Act of 1971, the Commission held that those practices continued to violate § 5 and entered an order prohibiting Beneficial from:

> "7. Using information concerning any customers of respondents, including the name and/or address of the customer, for any purpose which is not essential or necessary to the preparation of a tax return if such information was obtained by respondents as a result of the preparation of the customer's tax return which includes any information given by the customer after he has indicated, in any way, that he is interested in utilizing respondents' tax preparation services, unless prior to obtaining such information respondents have both (1) specifically requested from the customer the right to use the tax return information of the customer and (2) have executed a separate written consent signed by the customer which shall contain:
>
> 1. Respondent's name
> 2. The name of the customer
> 3. The specific purpose for which the consent is being signed

> 4. The exact information which will be used
> 5. The particular use which will be made of such information
> 6. The parties or entities to whom the information will be made available
> 7. The date on which such consent is signed
> 8. A statement that the tax return information may not be used by the tax return preparer for any purpose other than that stated in the consent, and
> 9. A statement by the taxpayer that he consents to the use of such information for the specific purpose described in subparagraph (3) of this paragraph;
>
> Provided, however, that nothing herein shall prohibit respondents from using names and addresses only of customers for the purpose of communication with such customers solely concerning respondents' income tax preparation business.
>
> Nothing in the above provision is intended to relieve respondents of any further requirements imposed on them by the Revenue Act of 1971, Pub. L. 92-178, title III, § 316(a), December 10, 1971; 26 U.S.C. § 7216 or regulations issued pursuant to it."

The instant petition for review followed the Commission's decision and order.

II. Deceptive Advertising

A.

At the outset, Beneficial contends that the Commission's finding that its "Instant Tax Refund" advertising campaigns were deceptive lacks evidentiary support, and that in the absence of such a finding, supported by record evidence, no order could properly have been entered respecting its advertising. Section 5(c) of the Act, 15 U.S.C. § 45(c), provides that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive" upon review in the Courts of Appeals. The law is clear that properly interpreted, the statute requires review by the substantial evidence in the record as a whole standard.[5] The parties agree that the tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context.[6] An intent to deceive is not an element of a deceptive advertising

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[5] *See, e.g.*, Adolph Coors Co. v. FTC, 497 F.2d 1178, 1184 (10th Cir. 1974) *cert. denied*, 419 U.S. 1105 (1975); American Cynamid Co. v. FTC, 363 F.2d 757, 772 (6th Cir. 1966); Continental Wax Corp. v. FTC, 330 F.2d 475, 477 (2d Cir. 1964); Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963); Snap-On Tools Corp. v. FTC, 321 F.2d 825, 835 (7th Cir. 1963); Carter Products, Inc. v. FTC, 268 F.2d 461, 493 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959). *See also* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 386 n.14 (1968) (citing Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)).

[6] *See, e.g.*, FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963); Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1943).

charge under § 5.[7] Moreover, the FTC has been sustained in finding that advertising is misleading even absent evidence of that actual effect on customers; the likelihood or propensity of deception is the criterion by which advertising is measured.[8] Whether particular advertising has a tendency to deceive or mislead is obviously an impressionistic determination more closely akin to a finding of fact than to a conclusion of law. *Cf. FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). At the same time, evidence that some customers actually misunderstood the thrust of the message is significant support for the finding of a tendency to mislead.

The initial advertising quoted above (1969-early 1970) did not indicate, at least in words, that the offered "advance" was actually a loan, that the customer would have to meet regular standards of creditworthiness, or that if the customer had a satisfactory credit rating, he could obtain a Beneficial loan even though he was not a tax return preparation customer. Beneficial's own advertising agency reported that the initial campaign resulted in fairly widespread public confusion as to the nature of the "refund" being offered. The Commission concluded:

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[7] Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963).

[8] Bankers Security Corp. v. FTC, 297 F.2d 403, 405 (3d Cir. 1961); Resort Car Rental Sys. v. FTC, 518 F.2d 962, 964 (9th Cir. 1974) (per curiam); Montgomery Ward & Co. v. FTC, 379 F.2d 666 (7th Cir. 1967); Feil v. FTC, 285 F.2d 879, 896 (9th Cir. 1960).

> "The early Instant Tax Refund advertising is, on its face, totally misleading about the true nature of Beneficial's offer. Instead of making clear that Beneficial is simply offering its everyday loan service, the advertising implies that Beneficial will give a special cash advance to income tax preparation customers with a government refund due, in the amount of their refund. The natural impression, since the Instant Tax Refund is stressed as exclusive and special is that this cash advance is different from a normal consumer loan."

This finding is supported by substantial evidence. While not conceding the validity of the Commission's finding with respect to the initial advertising, Beneficial does not seriously dispute that we must accept it. It contends, however, that because the early text was soon abandoned with no prompting from the Commission, the finding cannot support a cease and desist order. But this and other courts have held that at least where a discontinued deceptive trade practice could be resumed, the prior practice may be the subject of a cease and desist order.[9] Here the Commission's complaint was not filed until three years after the early advertising was discontinued, and there is no evidence from which the Commission could infer that it would in the early form be repeated. Beneficial urges that the entry of a cease

[9] Hershey Chocolate Corp. v. FTC, 121 F.2d 968, 971-72 (3d Cir. 1941); P. F. Collier & Son Corp. v. FTC, 427 F.2d 261, 271-72 (6th Cir.), *cert. denied*, 400 U.S. 926 (1970); Feil v. FTC, 285 F.2d 879, 886 n.15 (9th Cir. 1960).

and desist order in such circumstances, based solely on the early violations, would amount to an abuse of discretion.[10]

We need not decide that issue in this case, however, for we conclude that the Commission's finding that even the later advertising had a tendency to deceive or mislead has a sufficient evidentiary support in the record as a whole. The testimony of some consumers, credited by the Commission, was that during the later period they failed to understand that Beneficial was offering only its normal loan service with normal finance charges. Their impression was that the main qualification for the Instant Tax Refund loan was entitlement to an actual government refund. These consumers may well have been singularly dense.[11] They were, nevertheless, a part of the

[10] *See* Rodale Press, Inc. v. FTC, 407 F.2d 1252 (D.C. Cir. 1968); FTC v. Civil Service Training Bureau, 79 F.2d 113 (6th Cir. 1935); John C. Winston Co. v. FTC, 3 F.2d 961 (3d Cir.), *cert. denied*, 269 U.S. 555 (1925). *But see* C. Howard Hunt Pen Co. v. FTC, 197 F.2d 273, 281 (3d Cir. 1952).

[11] "The general public has been defined as 'that vast multitude which includes the ignorant, and unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.' The average purchaser has been variously characterized as not 'straight thinking,' subject to 'impressions,' uneducated, and grossly misinformed; he is influenced by prejudice and superstitution; and he wishfully believes in miracles, allegedly the result of progress in science . . . . The language of the ordinary purchaser is casual and unaffected. He is not an 'expert in grammatical construction' or an 'educated analytical

audience to which the advertisements were directed. We cannot second guess the Commission's finding respecting the later advertising. *FTC* v. *Colgate-Palmolive Co., supra; Fedders Corp.* v. *FTC*, 529 F.2d 1398, 1403 (2d Cir. 1976), *petition for cert. filed*, 44 U.S.L.W. 3652 (U.S. Apr. 19, 1976). Thus whether or not the Commission could have acted solely on the basis of the earlier advertising, it certainly did not abuse its discretion in concluding that some remedy was still appropriate since the confusion persisted.

B.

Both the administrative law judge and the Commission concluded that the *only* appropriate remedy for the violation found was a total ban on the use of the Instant Tax Refund phrase or any words of similar import. Beneficial contends that explanatory words could cure any tendency to mislead, and that an order forcing it to abandon entirely its copyrighted and heavily promoted phrase is unwarranted. The Commission reasoned:

> "No brief language is equal to the task of explaining the Instant Tax Refund slogan, for the phrase is inherently contradictory to the truth of Beneficial's offer. In truth, the Instant Tax Refund is not a refund at all, but only Beneficial's everyday loan service . . .; nor is it in the least related to any tax refunds, for the size of the loan Beneficial wishes to sell is geared to the customer's credit limit instead of his government refund and many people due a government refund do not qualify for an Instant Tax Refund loan at all . . . ."

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reader' and, therefore, he does not normally subject every word in the advertisement to careful study."

1 Callman, Unfair Competition and Trademarks § 19.2 (a) (1), at 341-44 (1950) quoted in FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963).

We do not believe that the Commission's conclusion as to the capacity of qualifying language to apprise Beneficial's audience of the true nature of the offered service can be sustained. We acknowledge, of course, that we are ordinarily obliged to defer broadly to the Commission's exercise of informed discretion in framing remedial orders that bear some rational relationship to the removal or prevention of an established violation. *See FTC* v. *National Lead Co.*, 352 U.S. 429 (1957); *FTC* v. *Colgate-Palmolive Co., supra; Windsor Distributing Co.* v. *FTC*, 437 F.2d 443, 444 (3d Cir. 1971) (per curiam); *Consumer Products of America, Inc.* v. *FTC*, 400 F.2d 930, 933 (3d Cir. 1968). But we are dealing in this case with the government regulation of a form of speech. The first amendment requires, we believe, an examination of the Commission's action that is more searching than in other contexts.

It is now established beyond dispute that there is no commercial speech exception to the first amendment. *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 44 U.S.L.W. 4686 (U.S. May 24, 1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975); *see also Young* v. *American Mini*

Theatres, Inc., 44 U.S.L.W. 4999 (U.S. June 24, 1976). That does not mean that an advertiser may engage in speech that is an essential part of a scheme to violate an otherwise valid law. *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 388 (1973). It does mean that the remedy for the perceived violation can go no further in imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective of preventing the violation. *See, e.g., United States* v. *O'Brien*, 391 U.S. 367, 382 (1968); *New Jersey State Lottery Commission* v. *United States*, 491 F.2d 219 (3d Cir. 1974) (en banc), *vacated as moot*, 417 U.S. 907 (1975); *Veterans & Reservists For Peace in Vietnam* v. *Regional Commissioner of Customs*, 459 F.2d 676 (3d Cir.), *cert. denied*, 409 U.S. 933 (1972); *Linmark Associates, Inc.* v. *Township of Willingboro*, No. 75-1448, at 49-54 (3d Cir. 1976) (Gibbons, J., dissenting).

Even before the demise of *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942), was heralded in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, and *Bigelow* v. *Virginia*, *supra*, the Supreme Court held that the Federal Trade Commission abused its discretion in ordering the excision from advertising of a valuable business asset like a trade name without considering whether modification of the message could eliminate the objectionable portion. *Jacob Siegel Co.* v. *FTC*, 327

U.S. 608 (1946); *FTC* v. *Royal Milling Co.*, 288 U.S. 212 (1933). The Second Circuit has said that where qualifying explanatory language does not inherently contradict the advertiser's identifying language it should be accepted in preference to requiring excision. *Elliott Knitwear, Inc.* v. *FTC*, 266 F. 2d 787, 790 (2d Cir. 1959). The Commission attempts to distinguish these authorities on the ground that no combination of words in which "instant" and "refund" appear in a proximate relationship can avoid conveying the impression that Beneficial is offering an instant tax refund from the government rather than an instant loan. We do not believe that the following examples convey that impermissible impression:

> "Beneficial's everyday loan service can provide to regularly qualified borrowers an Instant Tax Refund Anticipation Loan whether or not the borrower uses our tax service."
>
> or
>
> "Beneficial's everyday loan service can provide to any regularly qualified borrower an instant loan in anticipation of his tax refund. We call it an Instant Tax Refund Anticipation Loan."

In failing to consider fully the feasibility of requiring merely that advertising copy be rewritten in lieu of total excision of the offending language, the Commission would appear to have exceeded its remedial authority under § 5 as shaped by the *Jacob Siegel-Royal Milling* line of cases. The Commission's

opinion dealt with the *Royal Milling* case in a footnote:

> "Though we believe the *Royal Milling* line of cases is compatible with our normal responsibility to enter effective but not overbroad orders, to the extent it may actually be a limitation or exception to the Commission's authority to devise fully effective remedies, then we decline to expand the exception from trade names to advertising slogans."

We reject the limiting construction that the Commission attaches to *Royal Milling*. This conclusion is based in part upon the difficulty we have in accepting the Commission's differentiation between trade names and copyrighted advertising material—a distinction without a difference in the spirit of *Royal Milling*. The conclusion is reached not unmindful of the long shadow cast by the first amendment, however, for doubtless the Commission's broad construction of its § 5 remedial authority cannot survive the demise of the commercial speech exception to the first amendment. While *Royal Milling* in terms merely describes a statutory limitation upon the Commission's remedial power in a particular class of cases, the rule it announced has subsequently evolved into a general statement of constitutional principle.

The Commission, like any governmental agency, must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception. The Commission's

order proscribing use of the term instant tax refund or any other word or words of similar import or meaning, without consideration of the context in which the words appear, went further than was permitted for that purpose and was an abuse of the Commission's remedial discretion. It cannot in that form and without such consideration be affirmed or enforced.

III. The Tax Information Use Violation.

In its complaint the Commission charged that the retention and use of the customer tax information violated § 5 in two respects. First, it charged that the special relationship between a tax return preparer and a customer had the capacity and tendency to mislead the customer into the erroneous and mistaken belief that the information provided would be used solely for the preparation of the tax return and would remain confidential. Thus the failure to disclosed anticipated use in loan solicitation was said to be a false, misleading and deceptive practice injuring the customers. Secondly, the Commission charged that because Beneficial had competitors in the tax return preparation business, from whom business could be diverted, the failure to disclose anticipated use of the tax information in loan solicitations was an unfair method of competition.

Beneficial does not contend that the use of the tax information in loan solicitation, absent § 316 of the Revenue Act of 1971, is a subject matter beyond the reach of the Commission's § 5 authority. Rather, it

contends that the latter statute and the Treasury Regulations issued thereunder preempt the field, that it is now in full compliance with those regulations, and that the Commission's order requiring more is invalid. While admitting that § 5 originally gave the Commission authority to find unfair trade practices in relation to tax preparation services, Beneficial argues that § 316 was intended by Congress to circumscribe that power. Nothing on the face of § 316 supports that construction, and we have been referred to no legislative history which would tend to suggest such an intention.[12] The criminal prohibition in § 316 appears to be directed at preserving the confidentiality of tax return information except under specified circumstances. Enforcement under § 5 of the Federal Trade Commission Act, in contrast, is aimed at preventing unfair and deceptive acts and practices. There is nothing inconsistent between the two policies, and there is no reason for attributing to Congress the intention of reducing the Commission's power to prevent deception or unfairness. If the Commission had directed conduct which is inconsistent with the confidentiality policy of § 316, we could understand Beneficial's objection. But in this case the Commission is pursuing a separate governmental objective in a manner wholly consistent with that policy. That the Commission's order goes beyond

[12] The House, Senate, and House Conference Reports on the Revenue Act of 1971 are reproduced in 1971 U.S. Code Cong. & Admin. News 1825-2079. There does not appear to be any discussion of § 316 in any of these reports.

the requirements of Treasury Regulation 301.7216-3 in several insignificant respects seems to us unexceptionale. Nor does Beneficial's contention [13] that the Internal Revenue Service has approved its Form BOR-56 change our view. Assuming such approval, nothing in the Revenue Act of 1971 or any other statute confers on the Internal Revenue Service authority to determine what is an appropriate remedy for a violation of § 5 of the Federal Trade Commission Act.

The Commission's finding that Beneficial's practices, both prior to the enactment of § 316 and thereafter, were misleading because of the failure of Form BOR-56 to adequately disclose the nature and purpose of the waiver of confidentiality is supported by substantial evidence in the record as a whole. The remedial order, which permits Beneficial to solicit tax return customers for loan business, only requires the observance of certain procedural formalities. Items (1), (2), (3), (7), and (8) and (9) duplicate the six requirements of the Treasury Regulation. The additional items required to be disclosed are:

4. The exact information which will be used.
5. The particular use which will be made of such information.
6. The parties or entities to whom the information will be made available.

[13] That contention is disputed by the Commission as unsupported by the evidence. We need not resolve that dispute.

These additional requirements are rationally related to the unfair practices which the Commission found. We cannot in these circumstances hold that the Commission abused its discretion in fashioning the remedy it did.

IV. Conclusion

The petition for review will be granted insofar as the Commission's order requires total excision of the words "Instant Tax Refund" from all Beneficial advertising. That part of the order will be set aside and the case remanded to the Commission for further proceedings consistent with Part IIB of this opinion. In all other respects the petition for review will be denied.

TO THE CLERK:

PLEASE FILE THE FOREGOING OPINION.

Circuit Judge

VAN DUSEN, *Circuit Judge*, dissenting and concurring in part:

I respectfully dissent from part II-B of the majority opinion,[1] which states that the Commission did not consider whether modification of the message advertised could eliminate the objectionable, deceptive portion of such message. The majority opinion overlooks this language of the Commission's opinion (part II-C):

> "The law judge's order bans the use of the Instant Tax Refund phrase or similar words. He found no qualifying language could remedy

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[1] The majority apparently does not challenge the following findings of the Commission, which are supported by substantial evidence on the whole record (1193a):

> "In truth, it is admitted, what Beneficial is offering is its everyday loan service. The Instant Tax Refund is not a refund at all but a personal consumer loan, with regular finance charges, costs, and repayment period. . . . Such a loan is always available to anyone meeting Beneficial's credit standards, whether or not the customer is owed a tax refund by the government, but Beneficial will not make any loan to a person failing to meet its credit standards, even if the customer is due a government refund. The size of the loan Beneficial wishes to sell is not related to any tax refund, but to the customer's credit limit." [References to record omitted.]

The testimony of more than five consumers, credited by the Commission, was that they were misled during the later period and "failed to understand that Beneficial was offering only its normal loan service with normal finance charges" (majority opinion at 12). As stated by the majority, "[t]heir impression was that the main qualification for the Instant Tax Refund loan was entitlement to an actual government refund."

the deception and that only purging Beneficial's advertisements of the phrase would suffice. Beneficial vigorously contends that explanatory language could cure any fault and that forced abandonment of its copyrighted and heavily promoted phrase is unwarranted.

"In some instances, it is true, respondents have been allowed to retain trade names which had become valuable business assets, because the misleading qualities of the names could be dispelled by explanation. . . . If explanatory language is insufficient to qualify a deceptive trade name or is inherently contradictory, its effect is simply to confuse the public and the Commission in framing a proper remedy must excise the offending phrase altogether. [Citations omitted.] Moreover, the Commission has wide latitude in judgment, particularly in determining whether qualifying words will eliminate a deceptive trade name. . . .

"In light of these principles, we see no reason for allowing Beneficial to retain the offending slogan. The Instant Tax Refund advertisements, we have held, have the capacity and tendency to mislead and have in fact misled consumers. In fact, since its inception in 1969, the Instant Tax Refund phrase has deceived continuously, and Beneficial's repeated efforts to explain it have not cured the false impression it leaves. Beneficial's inability to remedy the deception, which persists even in the qualifying phrase it offers on this appeal as a settlement, confirms what we believe to be obvious. No brief language is equal to the task of explaining the Instant Tax Refund slogan, for the phrase is inherently contradictory to the truth of Beneficial's offer. In truth, the Instant Tax Refund is not a refund at all, but only Beneficial's everyday loan service, complete with normal finance charges and credit checks; nor is it in the least related to any tax refunds, for the size of the loan Beneficial wishes to sell is geared to the customer's credit limit instead of his government refund and many people due a government refund do not qualify for an Instant Tax Refund loan at all; moreover, depending on the season of the year or the customer's sales resistance, the Instant Tax Refund may be called a Vacation loan, a Taxpayer loan, or a Bill Consolidation loan.

* * *

"Beneficial argues that excision of the Instant Tax Refund slogan and words of similar import would prevent any reference to the concept of tax refund loans. This is quite true. The record is absolutely clear that, in Beneficial's business at least, no such concept exists. If, however, Beneficial should begin offering a special loan service actually related in some way to income tax refunds, it may seek to reopen the order. For now we believe the absolute prohibition necessary." [Footnotes omitted.] (1198a-1200a)

I do not believe that the advertisements suggested at page 16 of the majority opinion would make it clear to these consumers that the loan being offered is an everyday consumer loan having no relationship to tax refunds and no special features. Furthermore, on this record I believe the Commission was entitled to conclude that the words "tax refund loan" in-

herently contradict the idea of an everyday loan unrelated to refunds. The words "tax refund" imply something free and "unique" and the word "Anticipation" in the court-suggested advertisements might only underline the non-existent relationship between the loan and any refund. It is noted that the Commission gave Beneficial the right to reopen its order if a relationship between tax refunds and the loans was shown to exist in future advertisements (see page 2 above).

Given the Commission's consideration of the possibility of a lesser remedy, its broad discretion, and Beneficial's inability to produce an advertisement which was not misleading, I believe the excision order should be sustained. See *Baker's Franchise Corp.* v. *FTC*, 302 F. 2d 258, 262 (3d Cir. 1962), where this court said: "The matter of the choice of remedy is one for the Commission." See also cases cited at the top of page 14 of the majority opinion. At the least, I believe the Commission in the first instance should be permitted to consider any new advertisements using the Instant Tax Refund language before they are used.

I would affirm the conclusion reached in part II-C of the Commission's opinion in view of these legal principles adopted by the Supreme Court of the United States:

A. *The Commission may prohibit statements which, though literally true, are potentially deceptive.*

Although it is now clear that commercial speech enjoys "some" First Amendment protection, the Supreme Court has been careful to state that "regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive." *Young* v. *American Mini Theatres, Inc.*, 44 U.S.L.W. 4999, 5004 and n. 31 (U.S., June 24, 1976); see *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 44 U.S.L.W. 4686, 4693 and n. 24 (U.S., May 24, 1976), where the Court said: "The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely."

In *Young* v. *American Mini Theatres, Inc., supra* at 5004 n. 31, the Court stated: "The power of the Federal Trade Commission to restrain misleading, as well as false, statements in labels and advertisements has long been recognized [citing cases]."

B. *The federal courts are limited in their right to review the exercise by an administrative agency of its discretion.*

In *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946), the Court repeatedly emphasized the "limited" scope of our review of Commission discretion. In *Siegel*, the record did not indicate whether a remedy short of excision had been considered or would be adequate. The Court declined to

hold that excision was inappropriate and simply remanded for consideration of a more limited remedy. See also *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67 (1934) (upholding an excision order).

Here the Commission has considered and rejected a more limited remedy, and the *Siegel* case states at page 613 that: "The courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found."

Applying the standard enunciated in *Jacob Siegel*, which appears to survive the demise of the former commercial speech doctrine, I believe the choice of the remedy of total excision was permissible on this record.

In all other respects, I concur in the majority opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 75-2102

BENEFICIAL CORPORATION, a Delaware corporation and BENEFICIAL MANAGEMENT CORPORATION, a Delaware corporation, PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

(Federal Trade Commission No. 8922)

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

JUDGMENT

Present: VAN DUSEN, GIBBONS and ROSENN, *Circuit Judges*

This cause came to be heard on the record from the Federal Trade Commission and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition for review is granted insofar as the Order of the Federal Trade Commission entered July 15, 1975, requires total excision of the words "Instant Tax Refund" from all Beneficial advertising, and it is further ordered that such part of said order is set aside and the cause remanded to the Federal Trade Commission

for further proceedings consistent with Part II B of the opinion of this Court. In all other respects, the petition for review is denied.

ATTEST:

/s/ Thomas F. Quinn
Clerk

September 8, 1976

APPENDIX C

No. 75-2102

BENEFICIAL CORPORATION, a Delaware corporation and BENEFICIAL MANAGEMENT CORPORATION, a Delaware corporation, PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

(Federal Trade Commission No. 8922)

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

AMENDED JUDGMENT

Present: VAN DUSEN, GIBBONS and ROSENN,
Circuit Judges

This cause came to be heard on the record from the Federal Trade Commission and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition for review is granted insofar as the Order of the Federal Trade Commission entered July 15, 1975, requires total excision of the words "Instant Tax Refund" from all Beneficial advertising, and it is further ordered that such part of said order is set aside and the cause remanded to the Federal Trade Commission for further proceedings consistent with Part II B of the opinion of this Court. In all other respects,

the petition for review is denied. To the extent that the petition has been denied, the order of the Commission is affirmed and the petitioners are commanded to obey it.

ATTEST:

/s/ Thomas F. Quinn
Clerk

September 28, 1976

Certified as a true copy and issued in lieu of a formal mandate on October 26, 1976.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford
Stephen Nye

Docket No. 8922

In the Matter of

BENEFICIAL CORPORATION, a corporation, and
BENEFICIAL MANAGEMENT CORPORATION,
a corporation.

OPINION OF THE COMMISSION

By Engman, Commissioner:

In this case respondents Beneficial Corporation and Beneficial Management Corporation, which we shall refer to jointly as Beneficial unless otherwise noted, appealed from the Administrative Law Judge's Initial Decision and Order.

Beneficial operates a nationwide system of consumer loan offices and, starting in late 1969, the loan offices began offering a personal income tax preparation service. The complaint in this matter, which was issued on April 10, 1973, charged Beneficial with a variety of offenses under Section 5 of the Fed-

eral Trade Commission Act (15 U.S.C. § 45), stemming from the advertising and operation of the income tax service. During adjudication, counsel for the parties signed a Stipulation for Partial Adjudicated Settlement, by which Beneficial admitted violations, and consented to appropriate order provisions, concerning advertising misrepresentations of Beneficial's reimbursement policy, its competence to prepare tax returns, and the number of customers for whom it has secured government refunds. The law judge accepted this stipulation and we see no reason to overrule him. However, the order provisions which the law judge entered respecting these issues do not correspond in some particulars to the stipulated order provisions, and, on the joint motion of Beneficial and complaint counsel, we shall substitute the latter.

After the partial admission, the remaining issues to be adjudicated were the lawfulness of Beneficial's advertisements featuring its "Instant Tax Refund" slogan, the lawfulness of Beneficial's soliciting loans with information given by its tax service customers, and the liability of respondent Beneficial Corporation. The law judge found against respondents on each of these issues in an Initial Decision filed October 21, 1974. Respondents have appealed on each issue.

We affirm the Administrative Law Judge. Except to the extent that they are inconsistent with this opinion, the findings and conclusions of the law judge are adopted as those of the Commission.

I. LIABILITY OF BENEFICIAL CORPORATION

Every local loan office of what is known as the Beneficial Finance System is a separate corporation wholly owned, with the exception of a few shares of a few companies, by Beneficial Corporation. At the end of 1972, 1,505 of these local loan corporations operated domestically. (CX 18 at 8)[1] Beneficial Corporation also wholly owns respondent Beneficial Management Corporation, which provides management services, at cost, to the local loan subsidiaries. Other wholly-owned Beneficial Corporation subsidiaries include Beneficial Management Corporation of America, which implements the local loan policies set by Beneficial Management Corporation, and Beneficial Data Processing Corporation, which provides accounting services for the local loan subsidiaries. (I.D. ¶¶ 7, 20). It is undisputed that the conduct challenged in this matter was performed, directly at least, by subsidiaries, and that Beneficial Corporation must be subject to vicarious liability or none at all.

In determining a parent corporation's liability, we examine the "pattern and framework of the whole

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[1] The following abbreviations are used in this opinion:

I.D.—Initial Decision of Administrative Law Judge (cited by paragraph where adopted without change)

Tr.—Transcript of Testimony

CX—Commission Exhibit

RX—Respondents Exhibit

enterprise." *Art National Mfgs. Dist. Co.* v. *Federal Trade Commission*, 298 F.2d 476, 477 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962). And if the facts demonstrate even latent control, the applicable standard is met:

> [W]here a parent possesses latent power, through interlocking directorates, for example, to direct the policy of its subsidiary, where it knows of and tacitly approves the use by its subsidiary of deceptive practices in commerce, and where it fails to exercise its influence to curb illegal trade practices, active participation by it in the affairs of the subsidiary need not be proved to hold the parent vicariously responsible. Under these circumstances, complicity will be presumed.

P. F. Collier & Son Corp. v. *Federal Trade Commission*, 427 F.2d 261, 270 (6th Cir.), *cert. denied*, 400 U.S. 926 (1970).

Despite this clear statement, respondents contend that we should be governed instead by the common law rule, restated in *National Lead Co.* v. *Federal Trade Commission*, 227 F.2d 825, 829 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957), that to pierce the corporate veil we must find evidence of such complete control of the subsidiary by the parent that the subsidiary is a mere tool and its corporate identity a mere fiction. We reject the contention that any such stringent standard applies.

> Manifestly, where the public interest is involved, as it is in the enforcement of Section 5

> of the Federal Trade Commission Act, a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence would enable the corporate device to be used to circumvent the policy of the statute.

P. F. Collier, *supra*, 427 F.2d at 267. *See also*, *e.g.*, *Goodman* v. *Federal Trade Commission*, 244 F.2d 584, 590 (9th Cir. 1957).

Accordingly, we have examined the overall pattern of Beneficial Corporation's relation with its subsidiaries, and we find for several reasons that an order should issue against the parent.

First, respondent Beneficial Corporation shares a common management with respondent Beneficial Management Corporation. The President of the former serves as President and Chairman of the Board of the latter, and sits on the Executive Committee of each. The First Vice President of Beneficial Corporation also sits on both Executive Committees. Beneficial Corporation's Chairman of the Board is additionally General Counsel of Beneficial Management Corporation and, likewise, a joint Executive Committee member. These three men were a majority of Beneficial Corporation's Executive Committee and were the entire Executive Committee of Beneficial Management Corporation during much of the relevant period. The Executive Committee of Beneficial Management Corporation approved the

start of the income tax preparation business. (I.D. ¶¶ 30, 31, 32).

Through its domination of the service subsidiaries, Beneficial Corporation also controls each of its local loan subsidiaries. While no officer or director of the parent serves directly as an officer or director of any local loan subsidiary, Beneficial Corporation chooses local officers and directors from the ranks of the management subsidiaries.

Since at least 1969, Beneficial Corporation has installed each Regional Vice-President of Beneficial Management Corporation as a Director of all local loan subsidiaries in his region; typically, the same man also serves as President of all the local loan subsidiaries in the region. The remainder of each local Board is filled by a small group of employees of Beneficial Management Corporation of America. Thus, the President of Beneficial Management Corporation of America and two other employees of that corporation serve on the Boards of all 1,143 local loan subsidiaries outside New York, and are a majority of those Boards; the same three men are also, respectively, Secretary, Vice-President, and Treasurer of these 1,143 subsidiaries. (CX 145a; Tr. 198-201, 221, 226).

The Administrative Law Judge correctly called these patterns of control "a pervasive web of interlocking directories and managements." (I.D. at 40). Here, as in *P. F. Collier*, *supra*, 427 F.2d at 268, the men who directed the policy and operations of the

parent also directed the policy and operations of the wholly-owned subsidiaries.

Second, Beneficial Corporation also exercises complete financial control over the affairs of its subsidiaries. The local loan offices receive all cash for making consumer loans from the parent company, either by capitalization or by loan. Beneficial Data Processing Corporation performs all of the accounting for the local loan subsidiaries. The service subsidiaries provide their services to the local loan companies at cost, and themselves borrow needed funds from Beneficial Corporation. (I.D., ¶¶19, 20). Without the continuing support and intervention of the parent, neither the local loan subsidiaries nor the service subsidiaries would be independently viable.

Third, Beneficial Corporation also allows or encourages local loan subsidiaries to hold themselves out as part of a single nationwide Beneficial entity. Each of them is similarly named—Beneficial Finance Company of Pittsburgh, or of Knoxville, or of Charlotte. Moreover, they are jointly identified through advertising as the Beneficial Finance System, with offices nationwide and around the world. Consumers believed themselves to be dealing with a nationwide Beneficial organization. (Tr. 375, 426). As in *P. F. Collier*, *supra*, 427 F.2d at 269, Beneficial Corporation allowed its subsidiaries to trade on its own name and good will. Moreover, by clothing its subsidiaries with apparent authority to act for it, Beneficial Corporation is liable when they use that authority to de-

ceive the public. *Cf. Goodman* v. *Federal Trade Commission, supra,* 244 F.2d at 591-93.

Fourth, Beneficial Corporation has set up a retirement plan for all employees of the local loan companies and the service subsidiaries and has contributed several million dollars to the plan. Beneficial Corporation has also set up various other employee plans, such as a stock plan and a Thrift Club plan. (Tr. 208-10; I.D. ¶ 22).

Finally, the very advertising slogan which is a subject of this case is copyrighted by Beneficial Corporation. That the parent owns the slogan while the subsidiaries use it is further evidence, if any is needed, of the closely intertwined nature of Beneficial Corporation and its flock of subsidiaries. But the copyright ownership by itself is also sufficient to fix liability on Beneficial Corporation. As respondents vigorously point out when arguing to keep the slogan, the copyrighted phrase is a property right. And the law is clear that one who places into another's hand the instrumentality by which unfair or deceptive acts or practices are accomplished may be held responsible for those practices. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922); *C. Howard Hunt Pen Co.* v. *Federal Trade Commission*, 197 F.2d 273, 281 (3d Cir. 1952).

As we have noted, a sufficient standard is whether the parent, having latent power to halt illegal practices of its subsidiary, instead tacitly approved them. That standard is clearly met. In fact, Beneficial

Corporation's control was more than latent, for the parent was intimately entwined with the management, the finances, the employees, and the marketing practices of its subsidiaries. The paper division of Beneficial's business into 1,800 separate companies does not mask overall existence of a single enterprise. *See Zale Corporation, et al.* v. *Federal Trade Commission*, 473 F.2d 1317 (5th Cir. 1973). Whether looking at the pattern or framework of the whole enterprise or at the individual factors mentioned, we find Beneficial Corporation liable. Indeed, even though the common law standard argued by respondents is inapplicable, in this case that more stringent standard is met as well, for the subsidiaries were simply convenient fictions for Beneficial Corporation's use.

II. INSTANT TAX REFUND ADVERTISING

As the Administrative Law Judge found, substantially all of Beneficial's tax preparation advertising has featured the "Instant Tax Refund" theme. The first advertisements, in late 1969 and early 1970, gave little or no explanation of what Beneficial was actually offering. For example, one radio commercial states:

> . . . Do you have a refund coming to you on your income taxes this year? Well, there's no need to wait weeks for your refund check. Get the money right now—even before you mail your return—with a cash advance from Beneficial. We call it the Instant Tax Refund, a

special service of Beneficial Finance. Instant Tax Refund. At Beneficial you're good for more. . . . (CX 85(f)).

By February, 1970, after initial public response demonstrated widespread misunderstanding of the Instant Tax Refund (Tr. 65-66), Beneficial began to alter its advertising. Broadcast advertisements since then have variously referred to the "'Instant Tax Refund' Plan" or "'Instant Tax Refund' loans," and have included such explanatory language as "lend you the equivalent of your refund in cash" or "qualify for a loan." A typical television advertisement is:

> . . . And the Beneficial 'Instant Tax Refund' Plan. If you have a refund coming, Beneficial will lend you the equivalent of your refund in cash the instant you qualify for a loan. . . . (CX 84(f)).

Print advertisements also changed somewhat from their original form. After 1970 Beneficial placed an asterisk after the Instant Tax Refund reference with a corresponding asterisk below accompanied by explanatory language, or otherwise used the words "loan" or "Plan" with explanatory language. For example, CX 63 states:

> New Income Tax Service offers
> 'Instant Tax Refund' Plan *
>
> * * * *
>
> * When you get your taxes prepared at Beneficial you can take advantage of our 'Instant Tax Refund' Plan. The instant you qualify for

> a loan, Beneficial will lend you the equivalent of your refund—in cash—instantly . . . even before you mail your return. . . .

In truth, it is admitted, what Beneficial is offering is its everyday loan service. The Instant Tax Refund is not a refund at all but a personal consumer loan, with regular finance charges, costs, and repayment period. (Complaint, ¶ 7(1); Ans., ¶ 7; I.D. ¶ 48). Such a loan is always available to anyone meeting Beneficial's credit standards, whether or not the customer is owed a tax refund by the government, but Beneficial will not make any loan to a person failing to meet its credit standards, even if the customer is due a government refund. The size of the loan Beneficial wishes to sell is not related to any tax refund, but to the customer's credit limit. (CX 143e, 143i; Tr. 169).

A.

Beneficial takes a narrow view of the dispute on appeal. According to Beneficial, the only issue which its Instant Tax Refund advertising presents is whether Beneficial offers real tax refunds. The broader issue, whether consumers are deceived over what Beneficial actually does offer, is presumably irrelevant. Beneficial suggests that deciding this case on other than the narrow issue of actual refunds will import a new theory neither charged nor litigated.

We reject the idea that any such narrow question is before us. Beneficial had ample notice of the issues in this case, which were, and are, whether the

Instant Tax Refund advertising is unfair or deceptive under the Federal Trade Commission Act, and specifically whether the Instant Tax Refund advertising misrepresents that Beneficial is offering no more nor less than its normal consumer loan service with its normal finance charges. The complaint raises these issues by quoting Beneficial's advertising (¶ 5), charging that it seems to offer some "instant refund" (¶ 6(1)), and then alleging that in fact Beneficial is offering not a refund at all but a personal loan with finance charges (¶ 7(1)).[2] A clearer and more precise allegation is difficult to conceive. It certainly goes beyond the minimum standards of notice pleading acceptable in administrative hearings. *A. E. Staley Mfg. Co.* v. *Federal Trade Commission*, 135 F.2d 453, 454 (7th Cir. 1943).

During litigation, Beneficial clearly understood that this case related to the total truth of its offer and not just to actual tax refunds. Consistent with

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[2] The full charging paragraphs read

PARAGRAPH SIX: [Respondents have represented that]

1. Respondents will provide taxpayers who have their returns prepared by respondents and to whom a refund is owned by the Internal Revenue Service with an 'instant refund' at the time their returns are prepared.

* * * *

PARAGRAPH SEVEN: In truth and in fact:

1. Respondents' 'instant tax refund' is not a refund but a personal loan and the recipient of the loan is required to pay finance charges and other costs for such loan.

the position taken in is pre-hearing brief before the law judge that its advertisements "fairly and fully inform the public precisely what is involved," [3] Beneficial asked each of its consumer witnesses if they realized consumer loans with normal finance charges were offered. (*E.g.*, Tr. 364-65, 401, 460, 469-73). Beneficial also attempted to show that consumers understand the word "loan" to imply finance charges. (*E.g.*, Tr. 56-58, 114-15). Even assuming that only the narrow issue of actual tax refunds was alleged in the complaint, which we do not find, we have consistently held that a party cannot subsequently challenge as beyond the pleadings an issue which was litigated, if he has had actual notice and opportunity to defend. *Grand Caillou Packing Co.*, 65 F.T.C. 799, 820-821 (1964), *rev'd in part on other grounds sub nom. LaPeyre* v. *Federal Trade Commission*, 366 F. 2d 117 (5th Cir. 1966). *See also, e.g., Armand Co.* v. *Federal Trade Commission*, 84 F.2d 973 (2d Cir.), *cert. denied*, 299 U.S. 597 (1936); Rule 3.15(a)(2), 16 C.F.R. § 3.15(a)(2). In short, Beneficial has had a full and fair opportunity to litigate whether its advertising misrepresented the total truth of its offer, and we will decide that point.

B.

Turning, therefore, to Beneficial's advertising, we conclude that the Instant Tax Refund advertisements, in both their plain and adorned forms, had a capacity

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[3] Respondent's Trial Brief, before the law judge, October 30, 1973, at 4.

and tendency to mislead the public about the truth of Beneficial's loan offer, and thus violated Section 5. We find this both on the basis of our own expertise and judgment, from having examined the advertising, *see, e.g., Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965), and on the basis of ample record evidence. (*E.g.*, Tr. 53-55, 115-18, 506-07, CX 159).

The early Instant Tax Refund advertising is, on its face, totally misleading about the true nature of Beneficial's offer. Instead of making clear that Beneficial is simply offering its everyday loan service, the advertising implies that Beneficial will give a special cash advance to income tax preparation customers with a government refund due, in the amount of their refund. The natural impression, since the Instant Tax Refund is stressed as exclusive and special, is that this cash advance is different from a normal consumer loan.

Beneficial was acutely aware that the early advertising was misleading consumers about the nature of its offer, for it made all the subsequent changes in an attempt to clarify the real meaning. (Tr. 53-55, 115-19, 504-08). The extent of the early advertising's deception is epitomized by a report from Beneficial's advertising agency on the consumer impact of its first Instant Tax Refund campaign (CX 159):

> Results of this initial wave of interest depend on the office and its location. In center-city offices, particularly those near ghetto areas, the impression gathered from managers was that

> many of the phone calls came from totally uncreditworthy 'riff-raff' . . . people with no steady job record, with very low incomes, whose sole concern was in the Instant Tax Refund. Many thought they could simply get their government checks immediately at Beneficial. Others didn't have the required $5 deposit. There were many loud arguments and unpleasantnesses . . . including one or two incidents of violence being threatened. Managers in these situations tend to agree that advertising should have dealt more directly with the qualifications required to obtain an Instant Tax Refund.
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> In other offices—in steady, stable white middle class neighborhoods—many customers also needed explanations about the loan aspects of the Instant Tax Refund. But naturally there were fewer hopeless applicants, and managers in places like that feel much better about the high response level and are much calmer about the advertising claim.[4]

In the face of this, we are unpersuaded that, as Beneficial argues, consumers could decipher the real meaning of its advertising because the Instant Tax Refund phrase was placed in quotations or because Beneficial's identity as a consumer loan business may have given a clue. At any rate, consumers are not obliged to guess about the meaning of advertising.

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[4] Although we have rejected Beneficial's narrow construction of the complaint, we note that this memorandum indicates some consumers at least did believe Beneficial actually would provide real tax refunds.

Cf. Federal Trade Commission v. *Standard Education Society*, 302 U.S. 112, 116 (1937).

Beneficial contends that it eliminated any early faults by adding the explanatory language characteristic of its later advertising. Although, as we discuss *infra*, the later advertising is not appreciably less misleading than the early, even assuming that Beneficial did discontinue its early deception in this case we find it an insufficient defense. Whether a cease and desist order should be entered when discontinuance is claimed rests within the discretion of the Commission. *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F.2d 313, 322 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966). And the Commission has required respondents to meet a heavy burden to prevail on such a claim. *Compare, e.g., Argus Camera, Inc.*, 51 F.T.C. 405 (1954), *with Fedders Corp.*, Dkt. 8932, 3 CCH Trade Reg. Rep. ¶ 20,825 (Jan. 14, 1975). Assuming discontinuance of the early deception to have occurred, we can detect no reason to accept that discontinuance as a defense here, for we have no assurance that the deception will not be resumed. Beneficial is still in the tax preparation business and could revert at any time to similar deceptive practices. *See Giant Foods*, 61 F.T.C. 326, 357 (1962), *aff'd.*, 322 F.2d 977 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 967 (1964). Moreover, such changes as it made in its advertising came partly from the prodding of various regulatory agencies, so were not totally voluntary. (Tr. 11, 55, 70-71, 506-07). *See Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F.2d 321, 330 (7th Cir.), *cert. denied*, 323 U.S. 730 (1944).

At any rate, no discontinuance occurred, for, as we have noted, despite continual revision Beneficial's later advertising did not succeed in shedding the deceptive and misleading characteristics. The addition of the words "loan" and "plan" and "qualify" was not, in our view, sufficient to clarify exactly what Beneficial was really offering. As the law judge noted, the advertising at best is open to two interpretations. Though some consumers may understand that regular consumer loans are offered,[5] another interpretation is that Beneficial is offering a special, tax-related service apart from its everyday loan business. Of course, where two interpretations of an advertisement are possible, one of which violates Section 5, the advertising is unlawful. *Murray Space Shoe Corp.* v. *Federal Trade Commission*, 304 F.2d 270, 272 (2d. Cir. 1962).

Beneficial insists that we examine the later advertisements in their entirety, and consider the overall explanation of the Instant Tax Refund phrase. *Cf. Parker Pen Co.* v. *Federal Trade Commission*, 159 F.2d 509, 512 (7th Cir. 1946). We have done so. But as noted we find the explanation confusing and misleading. For example, addition of the sup-

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[5] Beneficial produced a number of such consumers. It appears from their testimony, however, that most of them understood the Instant Tax Refund for what it was because of their prior dealings with loan companies and not because they independently comprehended the advertising. (*E.g.*, Tr. 371, 391, 423, 472, 480-81, 495).

posedly explanatory word "plan" seems to us to heighten the implication of the Instant Tax Refund's uniqueness, rather than clarify that it is not unique at all. Thus, we have no occasion to determine whether the explanation, considering the advertising as a whole, was sufficiently conspicuous to dispel the impression generated by the dominant Instant Tax Refund slogan, for nothing amounting to real explanation was included.

The testimony of consumers confirms our view that the later advertising has a capacity to mislead in a material respect. A number of consumers failed to understand that Beneficial was offering only its normal loan service with normal finance charges. Their reasonable impression was that they would pay only a small fee and that the main qualification for the Instant Tax Refund was being due an actual Government refund. (Tr. 663, 691, 713-16, 775, 808-09). The consumers, had they realized from the advertising that the "Instant Tax Refund" was simply Beneficial's ordinary loan business, would not have gone to Beneficial's offices at all. (Tr. 665, 729, 745-46, 778).

We may assume, as Beneficial would have us, that respondents never intended to deceive consumers. But intent is not an element of a deceptive advertising charge under Section 5. *Regina Corp.* v. *Federal Trade Commission*, 322 F.2d 765, 768 (3d Cir. 1963). The simple fact is that Beneficial's Instant Tax Refund advertising had a capacity and tendency to deceive, and did in fact deceive, the consuming public.

C.

The law judge's order bans the use of the Instant Tax Refund phrase or similar words. He found that no qualifying language could remedy the deception and that only purging Beneficial's advertisements of the phrase would suffice. Beneficial vigorously contends that explanatory language could cure any fault and that forced abandonment of its copyrighted and heavily promoted phrase is unwarranted.

In some instances, it is true, respondents have been allowed to retain trade names which had become valuable business assets, because the misleading qualities of the names could be dispelled by explanation. *E.g., Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (1933). But *Royal Milling* and its progeny are not limitations on the Commission's authority to enter a fully effective order. If explanatory language is insufficient to qualify a deceptive trade name or is inherently contradictory, its effect is simply to confuse the public and the Commission in framing a proper remedy must excise the offending phrase altogether. *See, e.g., Resort Car Rental Systems, Inc.* v. *Federal Trade Commission*, —— F.2d —— (4th Cir. April 14, 1975); *Bakers Franchise Corp.* v. *Federal Trade Commission*, 302 F.2d 258, 262 (3d Cir. 1962); *Carter Products, Inc.* v. *Federal Trade Commission*, 268 F.2d 461, 498 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959); *United States Navy Weekly, Inc.* v. *Federal Trade Commission*, 207 F.2d 17, 18 (D.C. Cir. 1953). Moreover, the Commission has wide latitude in judgment, par-

ticularly in determining whether qualifying words will eliminate a deceptive trade name. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613 (1946).[6]

In light of these principles, we see no reason for allowing Beneficial to retain the offending slogan. The Instant Tax Refund advertisements, we have held, have the capacity and tendency to mislead and have in fact mislead consumers. In fact, since its inception in 1969, the Instant Tax Refund phrase has deceived continuously, and Beneficial's repeated efforts to explain it have not cured the false impression it leaves. Beneficial's inability to remedy the deception, which persists even in the qualifying phrase it offers on this appeal as a settlement, confirms what we believe to be obvious. No brief language is equal to the task of explaining the instant Tax Refund slogan, for the phrase is inherently contradictory to the truth of Beneficial's offer. In truth, the Instant Tax Refund is not a refund at all, but only Beneficial's everyday loan service, complete with normal finance charges and credit checks; nor is it in the least related to any tax refunds, for the size of the loan Beneficial wishes to sell is geared to the customer's

[6] Though we believe the *Royal Milling* line of cases is compatible with our normal responsibility to enter effective but not overbroad orders, to the extent it may actually be a limitation or exception to the Commission's authority to devise fully effective remedies, then we decline to expand the exception from trade names to advertising slogans. The Instant Tax Refund slogan is unlike the established company names in *Royal Milling*, for it is not the name of anything. It is an empty promotional phrase referring to nothing.

credit limit instead of his government refund and many people due a government refund do not qualify for an Instant Tax Refund loan at all; moreover, depending on the season of the year or the customer's sales resistance, the Instant Tax Refund may be called a Vacation loan, a Taxpayer loan, or a Bill Consolidation loan.

Nor are we inclined to temper our conclusion to ban the phrase simply because Beneficial has copyrighted it and promoted it heavily. The phrase, which is only six years old, has been deceptive from the start, so to protect it is to protect Beneficial's investment in deception. We reject the idea that the more heavily a false claim is advertised, the more tenderly we must treat it.

Beneficial argues that excision of the Instant Tax Refund slogan and words of similar import would prevent any reference to the concept of tax refund loans. This is quite true. The record is absolutely clear that, in Beneficial's business at least, no such concept exists. If, however, Beneficial should begin offering a special loan service actually related in some way to income tax refunds, it may seek to reopen the order. For now we believe the absolute prohibition necessary.[7]

[7] We are likewise unpersuaded by Beneficial's argument that the First Amendment bars this order. It is too clear to warrant discussion that the First Amendment does not protect commercial speech which has been found to be deceptive and misleading. *Murray Space Shoe Corp.* v. *Federal Trade Commission, supra*, 304 F.2d at 272. There is no constitutional

In light of what we have said we must affirm the law judge's order and reject Beneficial's offer of settlement.

III. MISUSE OF CONFIDENTIAL RELATIONSHIP

Finally, respondents appeal the law judge's conclusion that Beneficial misused confidential information gathered in the course of its tax preparation business, by using it to solicit loans without consent. The law judge held Beneficial's practices exploitative, unscrupulous, deceptive, and unfair.

The essential facts are not contested. Beneficial entered the tax preparation business for the explicit purpose of generating loan customers. (I.D. ¶ 54; Tr. 84). In practice the tax service, which Beneficial operated from the same offices as its loan business, fulfilled this goal; it was in fact the greatest source of new borrowers which Beneficial had developed in some time. (I.D. ¶ 55; Tr. 508).

Beneficial used two different procedures to turn tax customers into borrowers. First, from the beginning of its tax preparation venture in 1969 until December, 1971, Beneficial made no effort whatever to limit the use of customers' tax data to the preparation of tax returns. Under the procedure in effect during this period, Beneficial's employees prepared a tax interview sheet for each customer who pre-

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right to disseminate false or misleading advertising. *E. F. Drew & Co.* v. *Federal Trade Commission*, 235 F.2d 735, 740 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957).

sented himself for tax preparation. This sheet, which contained a variety of financial information, was sent to a computer firm for actual preparation of the return, and the customer frequently had to return a second time to pick up his completed return. (I.D. ¶ 58). Beneficial explicitly instructed its personnel to use the tax data appearing on the information sheet to solicit loans. For example, CX 26 states:

> Right on the Tax Interview Form it shows you what banks or loan companies the customer owes. It is an easy matter to go on from there and list other debts and show how all the bills can be consolidated, the bank loan can be paid off, the loan company can be paid off, the balance on the car can be cleared—all with a Bill Consolidation Loan.

In addition, if the customer were not sold a loan during the first interview, Beneficial solicited again during the second visit and continued to solicit thereafter by telephone and otherwise. (I.D. ¶¶ 62, 64). Personnel were instructed to run a credit check on those who, on their first visit, were reluctant to borrow money, (I.D. ¶ 63), and to present these customers on their second visit with completed loan papers awaiting only a signature. (I.D. ¶ 62).

After December, 1971, Beneficial revamped its procedure because of the enactment of the Revenue Act of 1971. Section 316 of that Act, 26 U.S.C. § 7216, imposed criminal penalties upon commercial tax preparers for using customers' tax data for non-tax purposes without consent. Under the new procedure,

Beneficial continued to stress turning tax customers into loan customers, but Beneficial's employees required each tax customer to sign a supposed consent form before soliciting any loan. The form, which Beneficial called a BOR-56 Authorization, purported to authorize Beneficial to solicit the customer for "any business" in which Beneficial may engage, and to stipulate that any data appearing on a loan application was not given for tax preparation. In addition to completing a tax interview sheet, Beneficial's employees were instructed to complete for each customer a loan interview sheet containing similar or identical financial information and to base their loan solicitation on the latter document. Beneficial maintained a separate "customer loan folder" for the loan information. (I.D. ¶¶ 65, 66).

A.

Beneficial contends for two reasons that our consideration of its loan solicitation practices should be limited. First, the pre-Revenue Act conduct is supposedly irrelevant, because, according to Beneficial, the law judge drew no legal conclusions from his extensive factual findings on this issue; apparently Beneficial argues that he tacitly dismissed this part of the case and the Commission should not alter his disposition. Second, the law judge's post-Revenue Act findings are, Beneficial says, beyond the scope of the complaint and thus should be dismissed.[8]

[8] Apparently in connection with this second argument, Beneficial also seems to argue that the law judge was improperly influenced by a personal belief that a dual loan and tax business is *per se* unfair. However, the law judge offered no such opinion and in fact specifically declined to rule on the issue. (I.D. at 37). The legality of dual operation was eliminated as an issue by complaint counsel on March 13, 1974.

Neither of these arguments is supportable. As to the pre-Revenue Act conduct, the law judge's opinion clearly considered and drew legal conclusions from the record evidence. In addition to entering detailed factual findings (I.D. ¶¶ 53-64), the law judge explicitly held that Beneficial's pre-Revenue Act practices were "offensive to the public policy, unethical, unscrupulous, unconscionable and clearly unfair to the consumer." (I.D. at 36). Of course, even had the law judge actually ignored Beneficial's pre-Revenue Act conduct, the Commission on review could itself fully consider its lawfulness. Rule 3.54(a), 16 C.F.R. § 3.54(a).

Beneficial's second argument—that the law judge's theory of post-Revenue Act violation is beyond the scope of the complaint—must be rejected on the same grounds that its similar claim respecting the tax refund advertising was rejected. According to Beneficial, the complaint, which alleged misuse of the "tax return" and the tax "financial profile," does not encompass Beneficial's post-Revenue Act procedure of preparing a separate loan information profile for loan solicitation instead of referring directly to the tax documents. But we do not read the complaint so restrictively. It plainly alleges misuse of a confidential relationship by soliciting loans, without con-

sent, using information given for tax purposes. (Complaint, ¶ 8). Since the law judge explicitly found the post-Revenue Act consent form inadequate to differentiate tax information from so-called loan information in customers' minds, the law judge correctly construed the complaint when he applied it to the post-Revenue Act procedures. Moreover, even accepting the argument that the complaint does not by its explicit terms encompass the post-Revenue Act procedures, we see no indication that the real substance of the dispute was not clarified for Beneficial during adjudication. As we noted before, an administrative complaint is a flexible document: semantic deficiencies will not preclude full resolution of the issues where the party proceeded against has a reasonable opportunity to know the matters in controversy. *Avnet* v. *Federal Trade Commission*, 511 F.2d 70, 76 (7th Cir. 1975). Beneficial has offered utterly no information suggesting it was prejudiced, or unfairly surprised, or otherwise unable to litigate the legality of its post-Revenue Act conduct. In fact, Beneficial itself highlighted the issue by raising the supposed lawfulness of its post-Revenue Act conduct as an affirmative defense.

We conclude, therefore, that the substantive lawfulness of Beneficial's conduct, both pre-Revenue Act and post-Revenue Act, is properly before us.

B.

We first consider Beneficial's pre-Revenue Act conduct. The law judge found this conduct unfair, be-

cause it violated basic public policy respecting the confidentiality of tax data, and deceptive, because it was premised on omission of material facts.

In determining whether Beneficial's conduct was unfair, the appropriate standard is a broad one. The Commission

> does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of unfairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

Federal Trade Commission v. *Sperry & Hutchinson*, 405 U.S. 233, 244 (1972).

In accordance with this mandate, the law judge determined the applicable public policy relating to use of tax data from a wide range of relevant statutory and ethical sources. However Beneficial argues that applicable public policy can only be found in a law or canon running by its terms to Beneficial, and that public policy deducted and synthesized from analogous situations cannot govern its conduct. Accordingly, for the period before the Revenue Act explicitly applied a standard of confidentiality to its business, Beneficial would find no applicable policy.

This argument totally misapprehends the scope of unfairness under Section 5 of the Federal Trade Commission Act. There is no doubt at this point that the Commission may adapt the substance of Section 5 to changing forms of commercial unfairness, and is not limited to vicariously enforcing other law.

Therefore, in this case, as in others, those who engage in commercial conduct which is contrary to a generally recognized public value are violating the Federal Trade Commission Act, notwithstanding that no other specific statutory strictures apply. *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 313 (1934); *Federal Trade Commission* v. *Sperry & Hutchinson, supra.* The passage of the Revenue Act reiterated, but certainly did not create, the policy of tax confidentiality which we apply here.[9]

The policy we apply is evident in the numerous incarnations of our society's concern for the confidentiality and proper use of personal tax data. This theme, broader than the letter of any one law, plainly links those public statutes which variously impose criminal penalties upon federal employees for revealing a tax return,[10] or allow disclosure of income tax returns only under Presidential order or regulation,[11] or forbid disclosure of state income tax

[9] In light of the pervasive and specific policy of tax confidentiality, we, like the law judge, have no need to decide whether a broader consideration of personal privacy could govern this case. In declining to reach that issue, however, we do not suggest that a generalized right of personal privacy and personal control over private data is an inadequate foundation on which to ground a finding of unlawfulness under Section 5. In fact, the right of privacy has become a widely-valued public policy, with constitutional and statutory underpinning. *Cf., e.g., Roe* v. *Wade*, 410 U.S. 113, 152 (1973); Privacy Act of 1974, 5 U.S.C. § 552a. Its violation in a commercial context would likely be unlawful under the Federal Trade Commission Act.

[10] 26 U.S. § 7213.

[11] 26 U.S. § 6103.

returns.[12] The same policy of tax confidentiality is also manifested in the ethical standards of other commercial tax preparers. Accountants,[13] certified public accountants,[14] and lawyers[15] would all be in violation of their ethical canons if they used tax information received from a customer to solicit a loan without consent. While it is not our intent to inject entire professional ethics codes into Beneficial's business, we believe the various similar fiduciary requirements of professional income tax preparers reflect a basic ethical consideration which by its nature is equally applicable to anyone in a position to abuse the confidence of a client.[16]

The reason for this statutory and ethical concern is obvious. Personal financial data is the private business of the individual to whom it relates. Its inherent confidentiality requires that the relationship

[12] Code of Virginia, § 58-46; *see also* I.D. at fn. 5.

[13] Tr. 134, 136, 148.

[14] Tr. 252, 255, 263.

[15] *See* Canon 4, Code of Professional Responsibility of the American Bar Association (Disciplinary Rule 4-101) and Ethical Consideration 4-5).

[16] Beneficial argues that some professional income tax preparers also solicit other business from their clients. However, in using tax data to identify other specialized needs of their clients, accountants and lawyers are fulfilling a professional obligation markedly different from Beneficial's practice of trying to sell loans to each of its tax customers. (Tr. 142-45, 257-59). The point in looking to other income tax preparers is not to make Beneficial and them indistinguishable, but only to identify an irreducible minimum quantum of fairness and commercial integrity.

between the tax preparer and his customer be a fiduciary one. This basic fiduciary nature is reflected in the personal expectations of consumers. (Tr. 256, 778). Numerous witnesses testified that they expect confidentiality from tax preparers and regard loan solicitation based on tax data as breach of confidentiality. (*E.g.*, 493-94, 666, 724-25, 809-10).

Beneficial argues however, that its misuse of tax information was minimal because the information was not transferred out of the company. However, even putting aside the evidence that Beneficial did in fact transfer the names of its tax customers outside the company while running credit checks, (CX 27, 34d; Tr. 37, 721-22), this argument ignores the fact that the confidential relationship is breached whenever the customer's information is used for the financial gain of the preparer. Whether or not respondents brokered the confidential information to other businesses, or simply capitalized on it themselves, is thus unimportant. By the same token, respondents' argument that customers expected to be solicited for loans because of Beneficial's reputation as a consumer loan business, and were not shocked at being solicited, ignores the record evidence that customers would not approve of any such loan solicitation made on the basis of their confidential tax data. (Tr. 667, 725). The fact that some tax customers initiated loan discussions themselves, typically by volunteering the amount of their anticipated refunds, demonstrates to us not their disinterest in the confidentiality of their tax data, but rather the

effectiveness of the Instant Tax Refund slogan in falsely convincing them that a regular consumer loan was somehow tax-related.[17]

Thus, we conclude that Beneficial's loan solicitation practices were indefensible. In the face of the prevailing public policy, the common basic standards of ethical behavior, and the widespread expectations of consumers, Beneficial during the preRevenue Act period engaged in wholesale and intentional disregard of the privileged nature of its relationship with its tax customers, and the confidential status of their tax information. Its practices preyed on the vulnerability of customers who were entitled to expect, and did expect, that their information would be handled with integrity and discretion. We cannot disagree with the law judge's characterization of Beneficial's activities as exploitative, unscrupulous, and unconscionable. We find Beneficial's behavior legally unfair.

The same public expectation of confidentiality which makes Beneficial's conduct unfair also makes it deceptive. Although the public expects the fiduciary character of a taxpayer-tax preparer relationship to be honored, Beneficial entered such relationships with no intention of guarding tax information from un-

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[17] One of the questions "most frequently asked," according to an instruction sheet issued to the local loan offices, is "Do you have to see proof that the customer is really entitled to a tax refund loan?" (CX 143i). This question epitomizes the confusion generated by Beneficial's advertising, which seems to offer a special service based on income taxes, but in reality it is not related to income taxes at all.

authorized use, and in fact converted tax data for its own profit. Beneficial's failure to disclose these conditions had the capacity to mislead consumers into believing that the information they provided would only be used for preparing their tax returns. Such an omission of facts which are material to an intelligent purchasing decision is unlawful. *See, e.g., P. Lorillard Co.* v. *Federal Trade Commission*, 186 F.2d 52, 58 (4th Cir. 1950). The law judge also found that full disclosure of material facts is particularly important in a confidential relationship. Though this is true, the general commercial duty to disclose material facts is sufficient to make Beneficial's actions deceptive.

Finally, the law judge found Beneficial's conduct deceptive because, in conjunction with the Instant Tax Refund slogan, it is analogous to bait and switch advertising. Although Beneficial's practices are not a classic bait and switch, the conceptual similarities are striking. Bait advertising is an enticing but insincere offer of goods or services, designed to obtain leads for a different product or service. *See, e.g.*, 16 C.F.R. Part 238.0, *Guides Against Bait Advertising*. Beneficial's tax advertising was consciously designed to generate customers for the loan business and, even though the tax preparation service itself was a legitimate offer, the Instant Tax Refund advertised as part of the service was not a legitimate offer at all. Since Beneficial's tax advertising was designed to attract customers with an alluring offer, and the tax service was designed to

switch the customers unwittingly to Beneficial's regular loan service, we find as an additional ground of deception that the loan solicitation practices were part of a pattern of conduct akin to bait and switch.

C.

We now turn to Beneficial's post-Revenue Act conduct, which on its face at least was an attempt to avoid use of confidential data. Beneficial argues that its new procedures cured the unfairness and deception in its early practices because it never used tax information to solicit loans after the Revenue Act became effective.

Even assuming this were true, it would not be an adequate defense to Beneficial's clear violations of law prior to the Revenue Act. As we noted earlier, discontinuance of unfairness or deception does not render a cease and desist order improper. *Coro, Inc.* v. *Federal Trade Commission*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). We have in rare occasions refrained from entering an order where discontinuance was voluntary, prolonged, and likely to be permanent. But here the discontinuance, assuming there were any, occurred only after a criminal statute prodded Beneficial into making changes. Given Beneficial's dual business and its persistent desire to turn tax customers into loan customers, we find no reason to refrain from issuing an order in this case because of Beneficial's supposed curing of its unlawful conduct.

At any rate, the new procedures did not in fact cure the deception and unfairness. Although the uninhibited conversion of private information which characterized the earlier period gave way to purported authorization forms and separated "tax" and "loan" folders, the net effect of the new procedure was to confuse consumers and continue to abuse their proper expectations concerning the use to which their confidential information would be put. We find Beneficial's post-Revenue Act practices unfair and deceptive in their own right.

The main factor distinguishing the new procedure from the old was the BOR-56 Authorization form which Beneficial required each tax customer to sign. Only if this paper were adequate to allow informed consumer consent to loan solicitation could a waiver of the fiduciary tax relationship occur. However, the law judge found the BOR-56 form totally inadequate on its face as a consent form, and we agree. It does not inform the customer that the fiduciary tax relationship is being terminated and that financial information given thereafter will be used for loan solicitation. Though it authorizes solicitation of "any business" it does not disclose what kind of business and it does not disclose that the solicitation is beginning even as the customer signs the form. Our independent view of the release form's inadequacy is reinforced by the testimony of consumer witnesses, some called by Beneficial, who had various opinions of the form's purpose, all wrong. (*E.g.*, Tr. 372, 395, 410, 486).

Obviously consumers have a right to waive the confidentiality of their tax data if they choose. And, since Beneficial does offer a useful service in both the tax and loan businesses, some tax customers will presumably wish to forego their purely fiduciary relationship with Beneficial. But this decision must be based on full disclosure and informed consent.

In light of the inadequacy of the BOR-56 form, the other changes in procedure after the Revenue Act become purely formal and without significance. Though Beneficial prepared what it called a Loan Interview Sheet for each customer, from the unsuspecting customer's point of view the information being gathered was still subject to the fiduciary tax relationship. Though Beneficial scrupulously separated what it called "loan" folders from the "tax" folders, so far as the customer understood every folder was a tax folder. For these reasons, we see no essential difference between Beneficial's post-Revenue Act conduct and its pre-Revenue Act conduct.

D.

The law judge entered an order designed to allow consumers to make an informed choice over waiving the confidentiality of their tax data. Beneficial argues that for several reasons the order is inappropriate.

Beneficial first argues that the Revenue Act of 1971, which provides criminal penalties for tax preparers, as a matter of law preempts the Federal Trade Commission Act in this area and precludes entering an order. Alternatively, Beneficial argues

that, as a matter of administrative discretion, the Commission should defer to the Revenue Act either by entering an order coextensive with that Act or entering no order at all.

The contention that the Revenue Act has *pro tanto* deprived the Commission of authority over the commercial misuse of income tax information is not persuasive. The courts have repeatedly rejected the argument that the Federal Trade Commission Act is ousted because of the possibly concurrent operation of another statute enforced by a different agency. The jurisdiction of the Commission has been seen as cumulative. *E.g.*, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 689-95 (1948) (Justice Department); *Warner-Lambert Co.* v. *Federal Trade Commission*, 361 F. Supp. 948, 953 (D. D.C. 1973) (Food and Drug Administration); *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757, 771 (6th Cir. 1966) (Patent Office); *Baldwin Bracelet Co.* v. *Federal Trade Commission*, 325 F.2d 1012, 1014 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 923 (1964) (Tariff Commission). In *Baldwin*, as here, the supposedly preemptive law was a criminal statute implemented with Treasury Department regulations. *See also Brandenfels* v. *Day*, 316 F.2d 375, 378 (D.C. Cir.), *cert. denied*, 375 U.S. 824 (1963).

Had Congress intended to limit the jurisdiction of the Commission, it would have done so explicitly, as it has before. *Cf.*, *e.g.*, Packers and Stockyards Act, 42 Stat. 159, 169 (Aug. 15, 1921), *amended*, 72 Stat. 1749, 1750 (Sept. 2, 1958); McGuire Act, 66 Stat.

631, 632 (July 14, 1952). But the Revenue Act contains no repeal, and the legislative history does not refer to the Commission at all. Nor will we infer repeal, for repeals by implication are not favored. Only where two laws are clearly repugnant to each other and both cannot be carried into effect will the latter prevail. *U.S.* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *L. Heller & Son* v. *Federal Trade Commission*, 191 F.2d 954, 957 (7th Cir. 1951). Here, though the civil requirements of the Federal Trade Commission Act may impose more stringent demands than the criminal standards of the Revenue Act, there is no repugnancy. Like the law judge we view Beneficial's possible compliance with the Revenue Act as irrelevant, and do not decide that issue.

Since the standards of the Revenue Act are irrelevant to this case, we see no reason to enter an order coextensive with that Act or to defer altogether. Our concern is to purge Beneficial's unlawfulness under Section 5. Because the fault we have found lies in the undisclosed use of confidential data, the law judge was correct in entering an order provision requiring full disclosure and consent before loan solicitation may begin. Under the order, Beneficial may not use any information given by a tax customer unless the customer has signed a consent form detailing, *inter alia*, the specific purpose for the consent, the exact information to be used, and the particular use intended. The lack of just this information is what makes the present BOR-56 form inadequate. Thus, the order provision is more than just

reasonably related to the offense found, *Jacob Siegel Co.* v. *Federal Trade Commission, supra,* 327 U.S. at 613; it is the most obvious and direct way to cure Beneficial's practices.

Beneficial also argues that the lack of a time limit in the order would make it impossible ever to give a loan to any tax customer who signed no consent, even years later. If Beneficial wished to solicit such a loan using information obtained because of the tax relationship, this is absolutely true. But if the loan should arise from the customer's wholly independent action, in a context far removed in time from the income tax experience, making the loan would likely not violate the order. At any rate, Beneficial could cure its supposed problem by securing a signed consent before obtaining information for the loan.[18]

Finally, Beneficial argues that the order does not allow it to solicit tax customers for additional tax business. We will add appropriate language to remedy this.

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[18] Beneficial has raised other hypotheticals which, it says, demonstrate that the order may deprive it of loan business even from willing tax customers. However, we are not persuaded to modify the order by "fantasies." *Federal Trade Commission* v. *National Lead Co., supra,* 352 U.S. at 431. Beneficial has recourse to our compliance procedures if actual situations arise which may be presented in evidentiary form. But Beneficial must expect some fencing in, and foregoing the hypothetical loan business may be a necessary price of simultaneously engaging in two essentially contradictory businesses.

IV. CONCLUSION

Having considered the entire record, the Initial Decision of the Administrative Law Judge, and the briefs, the Commission affirms the law judge to the extent set forth in this opinion. An appropriate order accompanies this opinion.

July 15, 1975

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 8922

In the Matter of

BENEFICIAL CORPORATION, a corporation, and
BENEFICIAL MANAGEMENT CORPORATION,
a corporation

INITIAL DECISION

By Montgomery K. Hyun, Administrative Law Judge.

David C. Fix, Esq. and
Robert D. Friedman, Esq.,
Counsel Supporting the Complaint.

George W. Wise, Esq. and
Timothy J. Bloomfield, Esq.,
Hogan & Hartson,
Washington, D.C.,
Counsel for Respondents.

PRELIMINARY STATEMENT

On April 10, 1973, the Federal Trade Commission issued a complaint charging Beneficial Corporation and Beneficial Management Corporation with a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by engaging in certain acts and practices in connection with their income tax preparation business. Paragraphs Four through Seven of the complaint allege that certain advertising claims made by respondents in connection with their income tax preparation business are false, misleading and deceptive. Paragraphs Eight and Nine of the complaint allege that respondents have used income tax information obtained from their tax preparation customers to solicit the latter for consumer loans and that these practices are deceptive and unfair to the consumer. By Answer duly filed, respondents denied that any of their challenged acts or practices violated Section 5 of the Federal Trade Commission Act.

Prehearing procedures commenced in May 1973. In January 1974, the case was reassigned to the present administrative law judge. Respondents' two motions to withdraw the matter from adjudication, duly certified to the Commission by the administrative law judges, were denied by the Commission in August 1973 and April 1974. In November 1973, counsel for the parties entered into a Stipulation For Partial Adjudicated Settlement, which was filed on December 3, 1973. As a result, all of the advertising issues in the complaint, except Paragraph Six (1) and Paragraph Seven (1) dealing with respondents' "Instant Tax Refund" advertising claims, were settled. Evidentiary hearings with respect to the remaining issues were held in April, May and June 1974, in Washington, D.C. Following reception of

further evidence upon a motion by respondents, the evidentiary record was closed on July 23, 1974, and the parties filed their respective proposed findings and orders, and briefs on August 23, 1974.

Any motions not heretofore or herein ruled on specifically or indirectly by necessary effect of the conclusions of this Initial Decision are hereby denied.

The proposed findings, conclusions and briefs of the parties have been given careful consideration, and to the extent not adopted in this Initial Decision in the form proposed or in substance, they are rejected as not supported by the evidence or as immaterial.

Having considered the entire record in this proceeding and the demeanor of the witnesses, together with the proposed findings, conclusions and orders and briefs submitted by the parties, the administrative law judge makes the following findings of fact.[1]

FINDINGS OF FACT

I. Respondents and Their Business

1. Respondent Beneficial Corporation is a corporation organized, existing and doing business under

[1] References to the record are made in parenthesis, using the following abbreviations:

CX —Commission Exhibit
RX —Respondents' Exhibit
Tr. —Transcript of the testimony
CPF—Complaint Counsel's Proposed Findings
RPF—Respondents' Proposed Findings
CB —Complaint Counsel's Brief
RB —Respondents' Brief

and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1300 Market Street, in the City of Wilmington, State of Delaware (Ans., par. 1).

2. Respondent Beneficial Corporation wholly owns subsidiaries engaged in the consumer loan business; many of those subsidiaries also operate a tax preparation business. In addition, Beneficial Corporation wholly owns Western Auto Supply Company (a nationwide merchandising company), Spiegel, Inc. (a mail order merchandising company), and various other companies engaged principally in the sales finance and creditor insurance business (CX 18 at p. 3). In 1972, Beneficial Corporation had a net income of approximately $82 million (CX 18 at p. 6).

3. Respondent Beneficial Management Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 200 South Street, in the City of Morristown, State of New Jersey. It is a wholly owned subsidiary of respondent Beneficial Corporation and provides various accounting, auditing, management services, including the formulation of advertising and sales policies, for the subsidiaries of Beneficial Corporation who operate the local loan and tax preparation offices (Ans. pars. 1; 2; Higgins, Tr. 204).

4. Respondent Beneficial Corporation through its subsidiaries has for many years been engaged in the consumer loan business and more recently in the tax

preparation business. Its subsidiaries, including respondent Beneficial Management Corporation, have formulated and caused the dissemination of advertisements concerning income tax preparation services throughout the United States. Respondents have maintained a substantial course of trade in the offering of consumer loans and income tax preparation services in commerce, as "commerce" is defined in the Federal Trade Commission Act. At all times mentioned in the complaint, respondents have been, and now are, in substantial competition with individuals, firms and corporations engaged in the offering of consumer loans and income tax preparation services of the same general kind and nature as offered by respondents (Ans., pars. 1-5; CX 18, 33, 137; Snyder, Tr. 8).

II. Liability of Respondents

5. Beneficial Corporation is a conglomerate primarily composed of the Beneficial Finance System (a general term used to refer to the Beneficial Corporation subsidiaries which engage in the loan and finance business), Spiegel, Inc., and Western Auto Supply Company (CX at p. 3; Higgins, Tr. 178; Finding 2).

6. On December 31, 1972, there were approximately 1800 subsidiaries in the Beneficial Finance System, 1505 of these in the United States. Each of these U.S. local loan offices are owned and operated by a separate subsidiary of Beneficial Corporation [hereinafter local loan subsidiaries]. Approximately

1300 of these offices offer tax preparation services. With the exception of a few shares of a few subsidiaries, Beneficial wholly owns all of the stock of the local loan subsidiaries in the United States (CX 18 at pp. 8-9; Higgins, Tr. 179, 152). Beneficial Management Corporation, also a wholly owned subsidiary of Beneficial Corporation, furnishes services at cost to the local loan subsidiaries (Ans., par. 2; Higgins, Tr. 204-05).

7. Beneficial Management Corporation of America is a wholly owned subsidiary of Beneficial Corporation. It employs regional and field supervisors throughout the country and is responsible for implementing the procedures which are established by Beneficial Management Corporation (Higgins, Tr. 205-06).

8. Beneficial Management Corporation formulated and approved all the advertising challenged in the complaint and in conjunction with the local loan subsidiaries caused its dissemination to members of the general public (Ans., par. 2; Snyder, Tr. 6-22; Findings 36-38, *infra*).

9. Beneficial Management Corporation prepared and disseminated to the local loan subsidiaries various memoranda, directives, and other documents containing instructions on the use of tax information at issue in this case (CX 19-34, 35, 38, 41; Ans. to Requests for Admissions 1, 3, 4; Snyder, Tr. 24-25, 27).

10. Beneficial Corporation's local loan subsidiaries disseminated various point of sale and direct mail

advertising pieces which were prepared by Beneficial Management Corporation. The local loan subsidiaries pay for the cost of this advertising (Finding 38, *infra*; CX 99-111, 124, 125, 162, 163, 164, 165; Snyder, Tr. 19).

11. Telephone directory advertising is often placed at the request of the local loan subsidiary and is generally paid for by that subsidiary (Snyder, Tr. 18; Findings 36-41, *infra*).

12. The acts and practices relating to use of tax information which are alleged to be unfair and deceptive in Paragraphs Eight and Nine of the complaint were actually committed by employees of the local loan subsidiaries (CX 25-27, 29, 34, 35, 38(a)) (Findings 59-64, *infra*).

13. Respondent Beneficial Corporation's wholly owned local loan subsidiaries committed the unfair and deceptive acts and practices alleged in the complaint (Findings 9-12, *supra*).

14. Respondent Beneficial Corporation is the sole stockholder of the local loan subsidiaries and either its Board of Directors or Executive Committee select who are to be on the Board of Directors of the local loan subsidiaries (Higgins, Tr. 196-97).

15. The officers of each of the 1143 local loan subsidiaries are identical, except for the president who is, in each region, the regional vice president of Beneficial Management Corporation. This pattern existed throughout the period 1969 through 1974 (CX 145(a); Donohue, Tr. 225-27).

16. All of the officers and directors of the non-New York local loan subsidiaries are employees of either Beneficial Management Corporation or Beneficial Management Corporation of America, both wholly owned subsidiaries of Beneficial Corporation (Higgins, Tr. 198-201; Findings 3, 6, 7, *supra*).

17. Beneficial Management Corporation of America employs between 75 and 100 persons. Its principal offices are located in the same building as are those of respondent Beneficial Corporation, in Wilmington, Delaware. It employs various field supervisors and auditors, and regional personnel and promotional supervisors throughout the county. Its only function is to provide supervision over, and service to, the local loan subsidiaries. It receives all of the funds necessary for its operations from Beneficial Corporation, and generally does not make a profit (Higgins, Tr. 205-20; Donohue, Tr. 245).

18. Mr. Carroll Donohue, who serves as director and vice president and secretary of all the local loan subsidiaries, is not paid a salary by the local loan subsidiaries for performing these services, but is paid by Beneficial Corporation, though he is neither an officer nor director thereof (Donohue, Tr. 220-21, 245).

19. All of the local loan subsidiaries rely solely on Beneficial Corporation for the money that they use in the operations. Funds are advanced to the local loan subsidiaries initially as capital contributions, or as loans. When a local loan subsidiary needs additional loans, it contacts the treasurer's depart-

ment of Beneficial Corporation to arrange for the needed financing. The decision whether to advance funds in the form of additional capital contribution or loans is made by the treasurer and comptroller of Beneficial Corporation (Higgins, Tr. 192-93; CX 18 at p. 9; CX 150(Z) (34-50)).

20. The accounting for the local loan subsidiaries in the Beneficial Finance System is handled largely by computer. Beneficial Data Processing Company, a wholly owned subsidiary of Beneficial Corporation, provides the computer service to handle the basic data relating to the loan and finance business. It operates a terminal and computer system in Morristown, New Jersey, which has a terminal in every local loan office. It obtains all the funds needed for its operation from Beneficial Corporation (Higgins, Tr. 207-08).

21. Beneficial Corporation in effect provides all the financing needed by the local loan subsidiaries for their operations and maintains a close watch over the financial operations of those subsidiaries (Findings 19-20, *supra*).

22. Beneficial Corporation operates various plans for the benefit of the employees of the local loan subsidiaries (Higgins, Tr. 208-11; CX 150(n), (Z)(57), (Z)(67), (Z)(2), (Z)(24), 150(m), 150(c); (Z)(13)).

23. Respondent Beneficial Corporation owns and effectively controls the local loan subsidiary corporations (Findings 10-21).

24. Respondents obviously endeavor to have the local loan subsidiaries identified in the public mind as part of the "Beneficial Finance System." All of the local loan subsidiaries are called "Beneficial Finance Company of ————————" (the name of the town in which they are located) (CX 18 at p. 3; Finding 5, *supra*; *Higgins*, Tr. 178-79). The name "Beneficial Finance" is displayed on the outside of most of the local loan offices. All of the advertising for respondents' tax service uses the terms "Beneficial" or "Beneficial Finance" (Findings 33-47, *infra*), and stresses the fact that a large nationwide organization is the entity offering the income tax preparation service. The tax service is referred to as the "Beneficial Income Tax Service." For example, CX 165(b) states: "Beneficial Income Tax Service—A Service of Beneficial Finance System—over 1700 loan and finance offices coast to coast."

25. There is evidence in the record that consumers are of the belief that they are dealing with a large nationwide company when they patronize a Beneficial local loan subsidiary and that such belief is one of the reasons they choose to have their taxes prepared at Beneficial (Deveny, Tr. 375; McIntire, Tr. 426).

26. The combined effect of respondents' advertising and the names of the local loan subsidiaries is to create the reasonable impression that the local subsidiaries are local representatives of some nationwide controlling "Beneficial" entity. That entity is in fact Beneficial Corporation (Findings 24-25).

27. Beneficial Management Corporation functions as a service organization for the local loan subsidiaries of the Beneficial Finance System. Beneficial Management Corporation does not directly engage in loan or income tax preparation business. Among the services it provides are supervision, audit, accounting, advertising, and legal services. It provides these services to the local loan subsidiaries at cost and does not make a profit. All of the funds for its operation come from Beneficial Corporation, through capitalization and advances of money as needed. Beneficial Management Corporation has never utilized outside sources of capital (Snyder, Tr. 6; Higgins, Tr. 204-05).

28. Some of respondents' "Instant Tax Refund" advertisements have been copyrighted. These copyrights are held by Beneficial Corporation (CX 113-20).

29. On April 26, 1972, there were 17 members of the board of directors of Beneficial Corporation. Of these 17 members, six worked for Beneficial Corporation or its subsidiaries: Messrs. Benadom, Bowes, Burd, Fultz, Higgins and Tucker. The remaining directors were outside directors (Higgins, Tr. 189-90).

30. Beneficial Corporation exercises control over Beneficial Management Corporation primarily through three men who hold key positions in both companies: Edgar T. Higgins, Cecil M. Benadom and Robert A. Tucker (CX 150).

31. The significance of the overlap demonstrated in Finding 30, *supra*, lies in the fact that during most of the time period relevant to this case, these individuals constituted a majority of the executive and finance committees of Beneficial Corporation and were the entire executive committee of Beneficial Management Corporation. Much of the formal decision-making responsibility of both corporations is exercised by these committees as opposed to the entire boards. Therefore, the three top executive officers of Beneficial Corporation are in a position to control effectively the activities of Beneficial Management Corporation (CX 150(f), (s), (Z)(16), (51), (63), (68), (18-34), (68-87); Higgins, Tr. 190-92; CX 178; Finding 14, *supra*).

32. The executive committee of the board of directors of Beneficial Management Corporation approved the decision to enter into the tax preparation business and were aware of the advertisement used with regard to Beneficial Income Tax Service (Snyder, Tr. 7, 10).

III. The Unfair and Deceptive Acts and Practices

A. *Stipulation for Partial Adjudicated Settlement*

33. On November 30, 1973, complaint counsel and counsel for respondents entered into a Stipulation For Partial Adjudicated Settlement which was filed on December 3, 1973. The effect of this stipulation was to settle all of the advertising issues in the complaint except Paragraph Six (1) and Paragraph Seven (1) which deal with respondents' "Instant Tax Refund"

advertising claims. Counsel stipulated that the cease and desist order provisions set forth in Paragraph Two of the Stipulation For Partial Adjudicated Settlement were appropriate relief in the public interest as to the acts and practices which were the subject of the stipulation (see Order, *infra*). Counsel also stipulated, *inter alia*, to the following facts concerning these advertising representations:

(A) Subsidiaries of respondent Beneficial Corporation disseminated the following advertisements:

Radio and Television

(1) "This year have your tax returns prepared a better way . . . by computer . . . at Beneficial Finance. With Beneficial's Income Tax Service for as little as $5 . . . you get maximum deductions . . . 100% accuracy . . . Plus you can get an Instant 'Tax Refund'. The instant you qualify for a loan—you get your refund . . . in cash—instantly. So have your taxes done at Beneficial Finance. and get your Instant 'Tax Refund'."

(2) "Where are the smart people having their tax returns prepared this year? At Beneficial Finance. That's right, Beneficial Finance—with its new, fully computerized Income Tax Service. You get all the deductions you're entitled to—and since your return is figured by computer, it's guaranteed accurate. Now . . . here's the big news: At Beneficial, and only at Beneficial, you can get an Instant 'Tax Refund.' The instant you sign your return and qualify for an on-the-spot loan, Beneficial advances you the full amount of your refund. So there's no waiting all those weeks and weeks for your check from the Gov-

ernment. It's the Instant 'Tax Refund'—at Beneficial Finance."

(3) "If you haven't done your income taxes yet . . . if you're worried about all those new forms and regulations . . . if like so many of us you just can't get down to all that figure work on your tax return—let Beneficial Finance take the load off your mind! For as little as $5, Beneficial's Income Tax Service will do your return by computer. It couldn't be simpler: Beneficial's computer figures out your maximum deductions and prepares your return with 100% accuracy. And, if you have a refund coming, you can get it right away with Beneficial's Instant 'Tax Refund' the instant you qualify for a loan, and get your refund—in cash—instantly! Just look in the white pages of your phone book for the Beneficial office near you. And, call up or come in . . . today."

Newspaper and Direct Mail

(1) "New Income Tax
Service Offers
INSTANT
'TAX REFUND'*

Beneficial Finance offers a complete tax preparation service, fully computerized to give you maximum deductions. Accuracy is 100% guaranteed. (Beneficial pays any penalty or interest if it makes an error!)

* If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for an

on-the-spot loan, you get your refund—in cash—instantly. Only at Beneficial.

This year, let Beneficial prepare your tax returns!	$5 and up.

And if you want cash to pay your taxes, or for any good reason, remember: you're good for more at Beneficial. Offices everywhere . . . open all year. Phone or come in . . . now! Avoid the rush."

(2) "Its a fact: 7 out of every 10 taxpayers who have their returns prepared by Beneficial's Income Tax Service get refunds."

(3) BENEFICIAL
INCOME TAX
SERVICE
. . . for as little as $5

(B) By and through the use of the above-quoted statement and representations, and others of similar import and meaning, respondents and their representatives have represented, and are now representing, directly or by implication, that:

(1) Respondents will reimburse the taxpayer for any payments the taxpayer may be required to make in addition to his initial tax payment, if such additional payments result from an error made by respondents and their representatives in the preparation of the tax return.

(2) Respondents' and their representatives' tax preparing personnel are specially trained and unusually competent in the preparation of tax returns and the giving of tax advice, and that they have the ability and capacity to prepare and give advice concerning complex and detailed income tax returns.

(3) The percentage of respondents' tax preparation customers who receive refunds is demonstrably greater than the percentage of the tax paying public at large who receive refunds.

(C) In truth and in fact:

(1) Respondents and their representatives do not reimburse the taxpayer for all payments he is required to make in addition to his initial tax payment if such additional payments result from an error made by respondents and their representatives in the preparation of the tax return.

(2) Respondents' and their representatives' tax preparing personnel are not specially trained and unusually competent in the preparation of tax returns and the giving of tax advice, and they do not have the ability and capacity to prepare and give advice concerning complex and detailed income tax returns.

(3) The percentage of respondents' tax preparation customers who receive refunds is not demonstrably greater than the percentage of the tax paying public at large who receive refunds.

Therefore, the statements and representations set forth above in Finding 34 (A) and (B), were and are, false, misleading and deceptive in violation of Section 5 of the Federal Trade Commission Act. (Stipulation For Partial Adjudicated Settlement)

B. *The "Instant Tax Refund" Advertising*

34. From 1969 through 1973, Beneficial Management Corporation either formulated or approved all of the advertising material utilized by respondents'

income tax preparation business. The advertisements were disseminated by subsidiaries of Beneficial Corporation. All of respondents' advertising introduced into evidence in this case was in fact disseminated (Ans., pars. 2, 4; Snyder, Tr. 8-12; CX 124). There are in evidence advertising schedules showing respondents' radio and television commercials that were run for the income tax seasons 1970 to 1973, and the areas where said commercials were run (CX 84-88; Ross, Tr. 79-80).

35. Films with audio, for two of the 1973 television commercials, were shown during the hearings and were introduced into evidence (RX 20A, B). Scripts of these two commercials, accurately reflecting the audio portion of each, were also received into evidence (RX 20D; CX 84J). Tape recordings and their transcripts of two of the 1973 radio commercials were played during the hearings and were introduced into evidence (RX 20C, E, F).

36. Telephone directory advertising of respondents' income tax preparation service was initiated in the second half of 1970, and began appearing in directories published in late 1970 or during 1971. A schedule showing the copy of the telephone directory advertising utilized, and where and when placed, prepared by respondents' advertising agency, was received into evidence (RX 89A-T; Ross, Tr. 79-80).

37. The format for newspaper advertisements used during the 1971 tax season in approximately six states was received into evidence (CX 56; Snyder, Tr. 20-21).

38. Beneficial Management Corporation prepares and causes to be printed various point of sale and direct mail advertising pieces, which are then shipped to the local loan offices for dissemination (Snyder, Tr. 19). Examples of these were introduced into evidence (CX 52-55, 57, 59, 76, 95, 100(B-C), 102 (B-C), 103(B-H), 104(B-C), 105(A-B), 106(A-B), 107(A-B), 108(A-B), 90-93, 97, 98, 110(A-G).

39. In 1973, approximately one-half to three-quarters of the Beneficial loan offices placed two foot by two and one-half foot advertising poster in their windows and a similar size poster in their lobbies (CX 164A-B), copies of both of which were introduced into evidence (Snyder, Tr. 22-23).

40. All of the advertisements utilized by respondents from 1969 through 1973 prominently featured the "Instant Tax Refund" theme. In almost all of the advertisements, this is the dominant message conveyed, the most effective representation made (See advertisements set forth in Findings 41-44, 55-59, *infra*).

41. Prior to February 1970 and prior to 1972, in the case of telephone directory advertisements, respondents' "Instant Tax Refund" advertising provided no explanation of what the "Instant Tax Refund" actually was. (CX 89(e)) is representative of such telephone directory advertisements placed from 1970 until the summer of 1972 (CX 89A-C):

BENEFICIAL FINANCE SYSTEM

Fully computerized Beneficial Income Tax Service gives you maximum deductions, complete accuracy. Exclusive: Instant "Tax Refund" loans. Phone or come in "WHERE TO CALL"

The "Instant Tax Refund" portion of the radio commercial set forth below was run throughout most of the country in 1969 and early 1970 (CX 85B):

> * * * Do you have a refund coming to you or your income taxes this year? Well, there's no need to wait weeks for your refund check. Get the money right now—even before you mail your return—with a cash advance from Beneficial. We call it the Instant Tax Refund, a special service of Beneficial Finance. Instant Tax Refund. At Beneficial, you're good for more * * * (CX 85F)

42. In the summer of 1972, certain minor changes were made in the copy used in respondents' telephone directory advertisements. The relevant change was the insertion of the word "Plan" between "Instant Tax Refund" and "loans." CX 89P below, is representative of the telephone directory advertisements used in most states from July 1972 until the present (CX 89B):

BENEFICIAL FINANCE COMPANIES

BENEFICIAL INCOME TAX SERVICE

Fully computerized to give you maximum deductions, complete accuracy. Special: As about "Instant Tax Refund" Plan loans, offices in this

area . . . find the office near you in the Yellow Pages under "Loans." Call or come in today.

43. The radio and television advertisements using the "Instant Tax Refund" theme underwent certain modifications from 1969 until the present. In approximately February 1970, the "Instant Tax Refund" representation was slightly changed to include the mention of the word "loan." The portions of the radio and television commercials set forth below are from the transcripts of commercials using the "Instant Tax Refund" theme from February 1970 until the end of the 1970 tax season. CX 85(c) was run throughout the country (CX 85(a)). CX84(b)-(c) was the only television commercial used during this time period. CX 84(a):

Radio

> * * * Now . . . here's the *big* news: At Beneficial, and only at Beneficial, you can get an Instant "Tax Refund." The instant you sign your return and qualify for an on-the-spot loan, Beneficial advances you the full amount of your refund. So, there's no waiting all those weeks and weeks for your check from the Government. It's the Instant "Tax Refund"—at Beneficial Finance * * * (CX 85(c))

Television

> * * * With their new, fully-computerized, Beneficial Income Tax Service. You get . . . maximum deductions . . . 100% accuracy. Plus, an Instant "Tax Refund." Get your refund, instantly with an on-the-spot loan.

So this year have your tax returns done at Beneficial Finance. There's an office near you * * * (CX 84(b)-(c))

44. In late 1970, before the 1971 tax season, the "Instant Tax Refund" representation, in radio and television advertising, was again slightly modified. In television commercials, the phrase "qualify for a loan" was added, and in radio commercials, the words "Advances you the full amount of your refund" were changed to "You get your refund—in cash—instantly." The television commercial transcript set forth below (CX 84(d)) was run throughout the country during the 1971 tax season, until March 1971 (CX 84(e)). The radio commercial transcript set forth below (CX 86(c)) is representative of the "Instant Tax Refund" theme in radio commercials run during this time period.

Radio

* * * Right now, at Beneficial Finance . . . You're good for an Instant 'Tax Refund.' At Beneficial, you're good for more. Why wait weeks for your refund check from the Government? Get an Instant 'Tax Refund' at Beneficial Finance. The instant you qualify for an on-the-spot loan, you get your refund—in cash—instantly. No matter where you may be borrowing, or had a loan before, call Beneficial . . . Get your Instant 'Tax Refund.' See Beneficial . . . Get your Instant 'Tax Refund.' Come to where you're good for more. Just look in the White Pages of your phone book for the Beneficial office near you * * * (CX 86(c))

Television

* * * Plus you can get an Instant 'Tax Refund.' The instant you qualify for a loan —you get your refund . . . in cash—instantly. So, have your taxes done at Beneficial Finance, and get your Instant 'Tax Refund' * * * (CX 84(d))

45. The final modification in the radio and television versions of the "Instant Tax Refund" advertising was made in March 1971. The word "Plan" was added after the phrase "Instant Tax Refund", and the phrase "lend you the equivalent of your refund in cash" was added. Although the commercials run subsequent to March 1971 vary, the "Instant Tax Refund" representation remains essentially the same in each (Higgins, Tr. 507-08). The portions of the radio and television transcripts set forth below are representative of the "Instant Tax Refund" theme in commercials run subsequent to March 1971.

Radio

* * * And listen to Beneficial's 'Instant Tax Refund' Plan: if you have a refund coming, you don't have to wait weeks for a Government check. The instant you qualify for a loan, Beneficial will lend you the equivalent of your refund, in cash, instantly. It's the 'Instant Tax Refund' Plan . . . at Beneficial Finance * * * (CX 87(b))

Television

* * * And the Beneficial 'Instant Tax Refund' Plan. If you have a refund coming,

Beneficial will lend you the equivalent of your refund in cash the instant you qualify for a loan * * * (CX 84(f))

46. Respondents' printed advertisements featuring the "Instant Tax Refund" theme also underwent minor modifications from 1969 until 1973. Beginning in 1970, the print advertising was modified by placing an asterisk after the "Instant Tax Refund" reference and a corresponding asterisk below where respondents purportedly explained the "Instant Tax Refund." CX 56, 57(a) and 60(b) are representative of the "Instant Tax Refund" reference with asterisk modification in print advertisements used from 1970 until March 1971:

New Income Tax
Service Offers

INSTANT
'TAX
REFUND' *

Beneficial Finance offers a complete tax preparation service, fully computerized to give you maximum deductions. Accuracy is 100% guaranteed. (Beneficial pays any interest or penalty if it makes an error!)

* If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for an on-the-spot loan, you get your refund—in cash —instantly. Only at Beneficial * * * (CX 56)

Instant
'Tax Refund' *

* If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for an on-the-spot loan, you get your refund—in cash —instantly. (CX 57(a))

Introducing . . .

Instant
'Tax Refund' *

* If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for a loan, Beneficial advances you the full amount of your refund. We call it the Instant 'Tax Refund.' (CX 60(b))

47. The final modification of the printed advertising occurred in mid-March 1971. The words "loan" or "plan" were added to the "Instant Tax Refund" reference, and the phrase "lend you the equivalent of your refund" was introduced (Higgins, Tr. 507-08). CX 93(a), set forth below, is representative of the use of the "Instant Tax Refund" slogan in printed advertising from mid-March 1971 to the present:

"Instant Tax Refund" Plan

If you have an income tax refund coming, you don't have to wait weeks for a Government check. The instant you qualify for a loan, Beneficial will lend you the equivalent of your refund in cash, instantly. (CX 93(a))

48. Respondents' "Instant Tax Refund" is an ordinary loan, not distinguishable in any way from any other loan specially or generally advertised or processed in the office of any consumer finance subsidiary of Beneficial Corporation, in terms of months to repay, amounts of loan available, rates of charge, or otherwise (CX 123; Snyder, Tr. 29).

49. Respondents' early advertisements, which contained no explanation whatever as to the nature of the "Instant Tax Refund" offer, had, on their face, the capacity and tendency to mislead the consumer into believing that if he let Beneficial prepare his income tax return and if the return should indicate a refund is due him, then Beneficial would, as a special service, give him a cash advance in the amount of his refund. There was nothing in the advertisements to alert the customer that what was being offered was a normal consumer loan with finance charges (Finding 14, *supra*). Respondents' executives admitted that the advertising was unclear; survey reports from their advertising agency showed customers were confused (CX 159(4-5); Ross, Tr. 84-85; CX 155(a); Ross, Tr. 87), and all changes made in the "Instant Tax Refund" advertising was made in an attempt to clarify what the "Instant Tax Refund" was (Snyder, Tr. 53-55, 71; Higgins, Tr. 506-07).

50. Respondents' subsequent attempts at explanatory language in their radio, television, and print advertising do not succeed in exposing the true nature of the "Instant Tax Refund" offer (See, e.g., adver-

tisements set out in Findings 42, 45, 47, *supra*). Read in the context of the whole the "explanatory" language does not adequately explain that what is being offered is a regular consumer loan with finance charges. When considered in its entirety, the message is confusing and misleading. The fact is that the modified advertisements contain two different and conflicting claims. The best that can be said is that the advertisements are susceptible of two meanings: one, that Beneficial offers "Instant Tax Refund", the other, that Beneficial offers a consumer loan to its customer—with conditions that are not revealed—if they qualify for such a loan. The former is clearly deceptive; therefore the advertisement as a whole is misleading. Moreover, the manner in which the attempted explanation is presented adds to the confusion and deception inherent in such advertising. In print, the "explanation" is generally far less prominently featured than is the "Instant Tax Refund" reference. (See, e.g., exhibits listed at Finding 47, *supra*). In the radio and television advertising, the dominant theme is the "Instant Tax Refund", not the "explanatory" language (CX 84-88).

51. There is, furthermore, substantial evidence in the record in the form of credible consumer testimony to the effect that members of the public were in fact confused. Misled and deceived by respondents' "Instant Tax Refund" advertising, even in its most modified form (CX 158(c); Martin, Tr. 661-63, 691; RX 20(d); Flot, Tr. 713-17, 727, 729-30, 735-38, 745-46, 764-70; CX 87(c); Moyers, Tr. 771-76, 778-

79, 780; CX 80(A-B); Snyder, Tr. 808-09; CX 84 (k)).

52. The administrative law judge finds therefore that even as finally modified, respondents' "Instant Tax Refund" advertising has the tendency and capacity to deceive the public (Findings 50-51, *supra*).

IV. Misuse of Tax Information

C. *Respondents' Conduct Prior to Passage of Section 316 of the Revenue Act of 1971*

53. Prior to actually doing so, respondents discussed internally for a number of years the possibility of conducting an income tax preparation business in their local loan offices. Discussions on the subject also took place between respondent Beneficial Management Corporation and its advertising agency Al Paul Lefton Co., Ins., with the idea that a tax preparation business in the local loan offices could generate additional loan business, through the sale of loans to tax customers (Snyder, Tr. 6-8; Ross, Tr. 83-84).

54. Respondents entered the tax preparation business in 1969, the purpose being to use the tax preparation business as a "feeder" to the loan business. Tax advertising was to enhance and develop the loan business, and great emphasis was placed on converting each tax customer into a loan customer (Higgins, Tr. 503, 508-09; Ross, Tr. 114; CX 20, 22, 24-27, 34, 38(a)). The loan and tax preparation businesses were and are completely interrelated (Higgins, Tr. 513-15).

55. Respondents' tax preparation business was in fact highly effective in producing new loan business for the local offices (CX 154(19), (22-30); CX 156 (a); CX 157(i); CX 127(c); CX 142(a)-(b); CX 143(b); Higgins, Tr. 508-09).

56. Respondents made extensive use of temporary employees to work in their local offices during the tax preparation season. These employees were used primarily to fill out tax interview sheets for tax preparation customers; they were not required to be experienced in tax matters, nor was much training required to learn to fill out interview sheets (CX 31, 32; Snyder, Tr. 34-35). Both temporary tax employees (if experienced) and other office personnel would solicit consumers for loans (Snyder, Tr. 34; Taylor, Tr. 161; CX 27, 32, 34).

57. Prior to December 1971, Beneficial Management Corporation prepared and disseminated certain instructions to the local loan subsidiaries of Beneficial Corporation that were engaged in income tax preparation on procedures to be followed in operating the tax business (CX 19-34, 35, 38, 41; Answer to Requests for Admissions, No. 1, 3, 4; Snyder, Tr. 24-25, 27).

58. Prior to December 1971, the general procedure followed by the local offices in their tax preparation business was as follows:

Employees in the local offices filled out tax interview sheets (CX 10, 11) and data sheets (CX 9) when necessary, for each tax customer. This entailed the customer's disclosure of a wide variety of per-

sonal and financial information (CX 10, 11, 34(b)). When completed, the sheets contained all the information necessary to complete a customer's federal tax return (CX 24, 38(a); Snyder, Tr. 31-32). The interview sheets and data sheets were sent to Programmed Proprietary Systems, Inc., a computer service which returned to the local office the completed tax return (CX 30; Snyder, Tr. 32). The customer returned to the office to pick up his completed tax return (CX 30). Copies of the interview sheets, data sheets, and completed Form 1040's were kept in the permanent files of the local office (CX 23, 29, 30).

59. The information furnished for tax preparation purposes gave respondent a valuable sales tool, as respondents realized. As CX 34(b) states:

> When you've completed the Tax Interview Form you'll have in front of you nearly all the information you need for making a loan. Take advantage of it. What more do you need?

The local office did make every attempt to take advantage of the opportunities that such information provided to sell the customer a loan (CX 20, 22, 24, 27, 34(d), 38(a), 41).

60. Respondents did not confine themseleves to soliciting tax preparation customers for "Instant Tax Refund" loans, but attempted to sell loans for a variety of purposes (CX 25-26; Snyder, Tr. 28-29). They used the information appearing on tax interview sheets to determine the particular type of loan to offer the customers (CX 25-27, 34, 35, 38(a)). For example, CX 26 states:

> Right on the Tax Interview Form it shows you what banks or loan companies the customer owes. It is an easy matter to go on from there and list other debts and show how all the bills can be consolidated, the bank loan can be paid off, the loan company can be paid off, the balance on the car can be cleared—all with a Bill Consolidation Loan (CX 26).

CX 25 states:

> When you get through taking the tax interview form you can determine—within reasonable limits—about how much the taxpayer will have to pay in taxes. Here's your chance, of course, to sell a loan to pay the Government the taxes the customer owes (Plus Bill Consolidation (CX 25)).

61. Failure to make a sale in the course of the first interview would not end the office's attempts to use the customer's tax information to sell him a loan (Findings 62-64).

62. Employees in the local offices used the information available on the tax interview forms to run credit checks on customers to whom they did not sell loans on the first interview. These customers were then approached again, with a "firm offer of a loan amount" made to them when they returned to the local office to pick up their completed tax returns (CX 27, 34(d)).

63. Employees in the local offices used the information available on the tax interview forms to determine credit worthiness of tax customers in order to decide whether to offer them a Beneficial Credit

Card. The Beneficial Credit Card is an identification card issued to customers so that they can identify themselves and be able to borrow money at local offices away from their home (CX 27, 35; Snyder, Tr. 37).

64. Employees in the local offices used the information on tax interview forms to solicit tax customers for loans or "Credit Cards" by telephone or otherwise long after these customers had concluded their tax business with the local office (CX 29, 35).

D. *Respondents' Conduct Subsequent to Passage of Section 316 of the Revenue Act of 1971*

65. Section 316 of the Revenue Act of 1971 was passed December 10, 1971, and became effective January 1, 1972. Beginning in December 1971, respondents disseminated instructions to employees in the field on new procedures to be followed in soliciting tax customers for loans (CX 126(a)-(f), 127, 129, 131, 132, 134, 138, 139, 142, 143). These included the use of a "BOR-56 Authorization" form by the local offices (CX 126(f)). This was supposedly a consent form, allowing the respondents to solicit the tax preparation customers for other business of the respondents. The offices were instructed to have each tax customer sign the BOR-56 before any tax work was done (CX 126(b)). Completed tax forms were placed in a special "Customer Tax Folder" (CX 126 (d)). If the customer had signed a BOR-56, respondents felt free to solicit him for a loan "Loan Information Sheets" were then filled out, containing such

data as bills owed by the customer, bank loans outstanding, loan company loans outstanding, car loans. All such information was kept in a "Customer Loan Folder", the only source to which the local office could refer in processing a loan (CX 139(i), (k); CX 142 (b), (c); CX 126(d)).

66. Respondents continued to emphasize the importance of selling loans to every tax customer, and to use the tax preparation relationship as a lead-in to the sale of loans (CX 127(j), (k); 129(d), (f); 130(c); 138(b), (h), (i); 139(f), (k), (m), (u), (z); 140(h); 142, 143).

67. The BOR-56 form fails to disclose clearly to the tax preparation customer respondents' intended use of tax information to solicit him for loans. It is inadequate on its face as a consent form (CX 126 (f)). Substantial evidence in the record supports the finding that consumers do not understand the nature of the BOR-56 (Deveny, Tr. 372; Dillard, Tr. 392-95; Harp, Tr. 409-11, 414-16; Bolt, Tr. 485-87; Flot, Tr. 717, 738-39).

E. *Deception*

68. Respondents failed to disclose to tax preparation customers the fact that information given for the purpose of tax preparation would not be kept confidential and used only for that purpose (Finding 67).

69. There is substantial evidence in the record that respondent's tax preparation customers consider the information they provide for tax preparation to be private, personal, and confidential, and that they

did or would feel taken advantage of by being solicited for loans based on that information without their consent (Dillard, Tr. 397-98; Snyder, Tr. 809-11, 835-36; Flot, Tr. 724-27; Moyers, Tr. 776-78, 793, 797-98, 804-06; McIntire, Tr. 428-29; Heath, Tr. 494-95).

70. Respondents' practices in using tax information to solicit for loans were receptive (Findings 68-69, *supra*).

F. *Respondents' Act and Practices Were Unfair*

71. Existing, established public policy, manifested in federal and state statutes as well as in the ethical codes of professional associations, regards individual income tax information as confidential (26 U.S.C. § 7216, Tr. 351; 26 U.S.C. § 7213, Tr. 356; 26 U.S.C. § 6103, Tr. 356; Code of Virginia § 58-27.4, Tr. 356; California Business and Professions Code § 17530.5, Tr. 356; CX 81, Tornwall, Tr. 250-55; CX 79, Hechinger, Tr. 130-35, 148; Canon 4, Code of Professional Responsibility of the American Bar Association, Ethical Consideration 4-5, Disciplinary Rule 4-101, Tr. 356).

72. Respondents' failure to respect the confidentiality of individual income tax information by allowing such information to be used to solicit tax customers for loans without their consent offends public policy and constitutes an unfair practice under *FTC* v. *Sperry and Hutchinson Co.*, 405 U.S. 233 (1972); (Findings 65-71, *supra*).

DISCUSSION

Stipulation for Partial Adjudicated Settlement and Remaining Issues

As a result of the Stipulation for Partial Adjudicated Settlement, filed of record by the parties on December 3, 1973, it was agreed that certain advertising issues set forth in Paragraphs Six (2) through (4) and Seven (2) through (4) of the complaint be settled without further litigation and an agreed-to order contained in the Stipulation may be entered covering the foregoing issues. Thus, the remaining issues to be litigated were: (1) whether respondents' advertising containing the "Instant Tax Refund" slogan is false, misleading and deceptive in violation of Section 5 (Paragraphs Six (1) and Seven (1) of the complaint); (2) whether the unauthorized use of income tax information by respondents for consumer loan purposes is a deceptive act or practice in violation of Section 5 (Paragraphs Eight and Nine of the complaint); and (3) whether such unauthorized use of income tax information by respondents is also unfair to the consumer in violation of Section 5 (Paragraphs Eight and Nine of the complaint).

The "Instant Tax Refund" Advertising

With respect to the "Instant Tax Refund" advertising which started in 1969 and continues to date, it is convenient to consider separately (1) the pre-February 1970 "Instant Tax Refund" advertisements, which did not employ any explanatory language, and (2) the post-February 1970 "Instant Tax Refund"

advertisements, which contain some explanatory language designed to qualify the "Instant Tax Refund" slogan.

A. *Pre-February 1970 "Instant Tax Refund" Advertisements*

We need not dwell long on the first group of advertisements for they patently and indisputably have the capacity and tendency to mislead the consumer into believing that if he lets Beneficial prepare his income tax return and if the return indicates any refund due him, then Beneficial will, as a special service, give him a cash advance, namely, and "Instant Tax Refund." CX 85F, a radio commercial which was run throughout most of the country in 1969 and early 1970, is a striking example of this group (Also Finding 41).

It is well settled that the Commission has the authority to draw its own inferences from challenged advertisements. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965). The Commission and the courts have long held that an advertisement is deceptive if it has the tendency or capacity to deceive the public. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F.2d 676 (2d Cir. 1944). And, in making this determination, the Commission looks to the impression the advertisement makes on the gullible and credulous rather than on the trained and experienced. *Id.* Also see *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 116 (1937); *Aronberg* v. *Federal Trade Commission*, 132 F.2d 165, 167 (7th

Cir. 1942); *Merck & Co., Inc.* v. *Federal Trade Commission*, 392 F.2d 921, 926 (6th Cir. 1968); *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962). Indeed, the central purpose of Section 5 is ". . . to abolish the rule of *caveat emptor* which traditionally defined rights and responsibilities in the world of commerce." *Federal Trade Commission* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963).[2]

B. *Post-February 1970 "Instant Tax Refund" Advertisements*

Beginning in February 1970, Beneficial made certain changes in the "Instant Tax Refund" advertisements designed to explain that what was being offered by these advertisements was in fact a consumer loan. The initial change was the addition of an asterisk to the "Instant Tax Refund" slogan in printed advertisements. The asterisk directed the reader to an explanatory sentence which stated in substance that "if you have a refund coming, you don't have to wait weeks for a government check. The instant you sign your return and qualify for an on-the-spot loan, you get your refund—in cash—

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[2] The record is also clear that respondents were made keenly aware of the confusion resulting from the use of this group of advertisements and decided to employ some form of explanatory language in conjunction with the "Instant Tax Refund" slogan beginning in February 1970 (Snyder, Tr. 53-55, 57; Ross, Tr. 115-18; Higgins, Tr. 506-07; CX 159; also see Finding 49).

instantly." Similar explanations were contained in all other advertising references to the "Instant Tax Refund" slogan. For example, see Paragraph 2(a) of the complaint.

In late 1970, the "Instant Tax Refund" advertisements were again modified. In television commercials, the phrase "qualify for a loan" was added, and in radio commercials, the words "advances you the full amount of your refund" was changed to "you get your refund—in cash—instantly" (Finding 44). Beginning in March 1971, the "Instant Tax Refund" slogan itself was expanded to include the words "loan" or "plan" (RX 13; CXs 71, 72, 83), and the expanded slogans were further accompanied by various explanatory language which stated in substance: the instant you qualify for a loan, Beneficial will lend you the equivalent of your refund in cash, instantly (Findings 45, 47).

Respondents contend that the "Instant Tax Refund" advertising thus modified and accompanied by further explanatory language adequately informs the consumer that what is being offered is a consumer loan. The administrative law judge is not able to accept this contention. When viewed and considered as a whole, the message is confusing and misleading. *Sebrone Co.* v. *Federal Trade Commission*, 135 F.2d 676, 679 (7th Cir. 1943); *Aronberg* v. *Federal Trade Commission*, 132 F.2d 165, 167 (7th Cir. 1942). This confusion is due to the fact that these advertisements contain two different and essentially conflicting claims. They first imply that Beneficial's tax preparation customers will get an "Instant Tax Refund." They then go on to imply that the promised "tax refund" is a "loan" and you must qualify for it. Furthermore, these advertisements are capable of misleading the public into believing that "loan" in this context means "a cash advance" offered as a special service to Beneficial tax preparation customers, for a nominal fee not related to interest charges, and that "qualify" in this context simply means that the tax preparation customer must have a refund due from the government (See Findings 50, 51). In other words, regardless of the literal truthfulness of the advertisement, the overall implication in the mind of the viewer-audience has the capacity and tendency to mislead. *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F.2d 52 (4th Cir. 1950); *Bockenstette* v. *Federal Trade Commission*, 134 F.2d 369 (10th Cir. 1943).

This is especially true because the "Instant Tax Refund" slogan is an explicit and dominant theme and no qualifying language which may follow it can entirely undo the initial impact of that theme. *Cf. The J. B. Williams Co., Inc.* v. *Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967).

The most charitable conclusion which can be drawn from these advertisements is that they are confusing, that they are susceptible of two meanings. Namely, one that Beneficial offers an "Instant Tax Refund" and the other that Beneficial offers a consumer loan to its customers if they qualify for such a loan. The former is clearly deceptive. Section 5 condemns

such advertisements. In Judge Augustus Hand's words, the Commission can "insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein.'" *General Motors Corp.* v. *Federal Trade Commission*, 114 F.2d 33, 36 (2d Cir. 1940). Also see *Rhodes Pharmacal Co., Inc.* v. *Federal Trade Commission*, 208 F.2d 382, 387 (7th Cir. 1953), *rev'd on other grounds*, 348 U.S. 940 (1955); *Murray Space Shoe Corporation* v. *Federal Trade Commission*, 304 F.2d 270 (2d Cir. 1962); *Giant Food Inc.* v. *Federal Trade Commission*, 322 F.2d 977, 981 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964); *United States* v. *95 Barrels of Vinegar*, 265 U.S. 438, 443 (1924).

Furthermore, there is substantial evidence in the record which tends to show that the modified "Instant Tax Refund" advertisements confused and misled the public and that a number of consumers recalled the dominant theme of these advertisements to be an offer of "Instant Tax Refund" (Martin, Tr. 663-65, 672, 691-93; Snyder, Tr. 826-27; Moyers, Tr. 785). This, in return, reinforces the administrative law judge's impression of Beneficial's current television and radio commercials that they prominently feature the "Instant Tax Refund Plan" and play down the explanation (RX 20B and D).[8]

[8] It is true that some of respondents' consumer witnesses testified to a clear understanding of these advertisements to mean an offer of a consumer loan. However, they were for the most part persons who were knowledgeable of the operations of the consumer loan industry, including Beneficial, by reason of prior dealings or otherwise (Tr. 371, 384, 423, 406-07, 495, 472, 480-81, 611-12). It is well settled that testimony by some consumers that they personally would not be misled or deceived does not preclude a finding by the Commission that the challenged advertisement is deceptive. *Double Eagle Lubricants, Inc.* v. *Federal Trade Commission*, 360 F.2d 268 (10th Cir. 1965), *cert. denied*, 384 U.S. 434 (1966).

Furthermore, as pointed out hereinabove, the purpose of Section 5 is to protect the gullible and credulous as well as the trained and knowledgeable, *supra*, p. 26.

Unauthorized Use of Income Tax Information for Loan Purposes

A. *Deceptive Act*

Complaint counsel contend that the use by Beneficial of confidential tax information for the purpose of soliciting consumer loans from its tax preparation customers is deceptive because the customers are not told in advance that Beneficial will make such use of the confidential tax information furnished to it. The theory appears to be that Beneficial's failure to disclose this material fact constitutes a deceptive act in violation of Section 5. In order to support this theory, complaint counsel further contend that Beneficial, by virtue of certain affirmative representations it makes, creates an expectation on the part of its tax preparation customers that the income tax information they furnish Beneficial will be kept confidential.

In the administrative law judge's view, however, confidentiality inheres in the very nature of personal

income tax information regardless of whether Beneficial makes, or does not make, any affirmative representations regarding confidentiality (See further discussion, *infra*, pp. 31-32). Furthermore, the record shows the element of confidence is an important aspect of the relationship between a taxpayer and a tax preparer (Findings 69, 71, Crossley Survey). Beneficial's failure to disclose the material fact that the tax information will be used for loan solicitation purposes in these circumstances clearly is a deceptive practice in violation of Section 5. *All-State Industries of N.C., Inc.* v. *Federal Trade Commission*, 423 F.2d 423 (4th Cir. 1970), *cert. denied*, 400 U.S. 828.[4]

Furthermore, what is deceptive here is the use of the "Instant Tax Refund" advertising as a *device* to lure tax preparation customers to Beneficial's offices for the purpose of soliciting them for consumer loans. In a real sense, Beneficial's practice in this respect is akin to the so-called "bait and switch" device, which is a deceptive act in violation of Section 5. *Tashof* v. *Federal Trade Commission*, 437 F.2d 707 (D.C. Cir. 1970); *Pati-Port, Inc.* v. *Federal Trade Commission*, 313 F.2d 103 (4th Cir. 1963). The rationale of these cases applies with equal force to this

[4] It is well recognized that in such confidential relationships, *caveat emptor* has no place and equity imposes on the parties the duty to act in accordance with the highest standards of morality. Cardozo, *The Nature of the Judicial Process*, 109-110 (1922); Pound, *The Spirit of the Common Law*, 24-25 (1921). Such duty includes that of full disclosure of material facts. 2 Pomeroy. *Equity Jurisprudence* § 902. *Cf.* 1 Story, *Equity Jurisprudence*, § 206.

case. It is the administrative law judge's determination that Beneficial's use of the "Instant Tax Refund" slogan for the purpose of obtaining leads to loan prospects or luring tax service customers to Beneficial's loan offices for the purpose of making loans is equally a deceptive act in violation of Section 5.

B. *Unfairness*

Complaint counsel further argue (1) that the use by Beneficial of confidential tax information for the purpose of soliciting consumer loans is offensive to the public policy regarding personal privacy, and (2) that Beneficial's loan solicitation of its tax customers is immoral, unethical, oppressive and unscrupulous. For these reasons, it is argued, that Beneficial's practices are unfair to the consumer within the meaning of the Section 5 under *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934) ("*Keppel*") and *Federal Trade Commission* v. *Sperry and Hutchinson Co.*, 405 U.S. 233 (1972) ("*S&H*"). It is the determination of the administrative law judge that the challenged practices are unfair under *Keppel* and *S&H* because (1) they offend the well-established public policy regarding the confidentiality of income tax information, and (2) they are unethical, exploitative and unscrupulous.

In their defense, respondents have advanced several arguments. *First*, it is argued that a business practice, in order to be unfair to consumers within the meaning of Section 5, must be a violation of some

public policy codified into a statute or recognized by common law. In this connection, respondents contend that, until the enactment of Section 316 of the Revenue Act of 1971 (26 U.S.C. § 7216), the principle of confidentiality of individual income tax information did not acquire such a status. *Secondly*, it is argued that, to the extent that the confidentiality principle was recognized, it did not apply to the so-called commercial tax preparers, such as Beneficial, in any event. Respondents contend that Beneficial's tax customers did not regard Beneficial's tax preparers as tax experts or professionals who would be strictly bound by the confidentiality principle. Indeed, respondents further suggest that, because the fees charged by Beneficial for its tax service are substantially smaller than those customarily charged by lawyers and accountants, Beneficial's tax customers did not expect, or should not have expected, Beneficial to be strictly bound by the confidentiality principle. In the administrative law judge's view, these arguments are without merit and should be rejected.

The fact is that Congress, by the enactment of the 1971 Revenue Act, codified the confidentiality principle, prescribing criminal sanctions. Equally importantly, long before the 1971 Revenue Act, Congress explicitly demonstrated its public policy concerns regarding the confidentiality of income tax information. For example, 26 U.S.C. § 6103 provides in substance that income tax returns are open to inspection only upon order of the President and under rules and regulations approved by the President. 26 U.S.C.

§ 7213 prescribes criminal penalties for federal employees who disclose information contained in an income tax return.[5]

In the final analysis, the confidentiality principle inheres in the very nature of personal income tax information and governs the *relationship* between the taxpayer and another person who may be entrusted with the information by the taxpayer. The relationship thus is fiduciary in nature. Therefore, the administrative law judge is unable to accept the argument that the amount of fees paid determines whether or not the person entrusted with such tax information is to be bound by the principle of confidentiality. This is not to ignore the reality that money is a universal measure of commercial transactions. I simply conclude that the relationship existing between a taxpayer and a tax preparer entrusted with his tax information imposes upon the latter, as a matter of equitable principle, the duty of confiden-

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[5] It has been stated that the purpose of the statute is to "prevent the disclosure of confidential information to those who have no legitimate interest in it." *Star* v. *Rogalny*, 22 F.R.D. 256 (1958) (E.D. Ill.). That the policy behind § 6103 is directly related to that behind the federal prohibition of use and disclosure by income tax preparers can be seen from Senator Mathias' comparison of the former provision and his proposed law. 117 Cong. Rec. S. 8318, March 29, 1971. A great many states have provisions similar to 26 U.S.C.A. § 7213 making state income tax return information confidential. See, e.g., District of Columbia, Sec. 47-1564c, D.C. Code; Virginia, Code of Virginia § 58-46; Maryland, An. Code Md. § 300; Massachusetts, Sec. 58, Ch. 62, G.L.; Minnesota, Sec. 290.61; Ohio, Sec. 5747.18 R.C.; New York, Sec. 697, Tax Law, Ch. 60 C.L.; Michigan, Sec. 206.465, C.L.

tiality regardless of the amount of fee paid or the professional status of the latter.[6]

More importantly, respondents' argument that a business practice, in order to be unfair to consumers within the meaning of Section 5, must be a violation of some public policy codified into a statute or recognized by common law is an attempt to restrict the Trade Commission's Section 5 power to enforcement of *existing* statutes. In essence, it is an attempt to turn the clock back half a century to the days of *Gratz*.[7] However, the attempts to restrict the Trade Commission's Section 5 power to existing or recognized methods of competition have been consistently rejected by the Court since *Keppel*.[8] Respondents

[6] There is testimony in this record that the confidentiality of tax information is taken for granted even in cases where the tax preparers are laymen (Tr. 776).

[7] In that case, the Court, narrowly circumscribing the Trade Commission's discretion to define and declare an act an unfair method of competition, struck down the Commission's cease and desist order banning tying arrangements and said: "The words 'unfair method of competition' are not defined by the statute. . . . They are clearly inapplicable to practices never before regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." (253 U.S. at 423-427).

[8] *Keppel* recognized for the first time the Trade Commission's power to go beyond established common law principles to determine that lottery sales were an unfair method of competition in violation of Section 5. The court said: "We do not intimate either that the statute does not authorize the prohibition of other and hitherto unknown methods of com-

would now, in this case involving unfairness to the consumer, rely on the same argument rejected by the Court in the unfair-method-of-competition cases.

Contrary to respondents' argument, however, the Trade Commission's power to define and prohibit *new* unfair acts as they arise, and do so apart from existing statutes or established public policy, is not open to question. The clear holding of the *Keppel* and *S&H* cases is that the Commission has that power. In *Keppel*, the Court accepted a gambling analogy to uphold a Trade Commission ban against lottery sales of candies to children. There, the Court was essentially striking at the unfairness of a practice which exploited the vulnerabilities of children. In *S&H*, the Court, reaffirming the Trade Commission's power to prohibit trade practices which are unfair to consumers (405 U.S. at 239-244),[9] merely insisted that

petition or, on the other hand, that the Commission may prohibit every unethical competitive practice regardless of its particular character or consequences. New or different practices must be considered as they arise in the light of the circumstances in which they are employed." (291 U.S. at 314). Also see *FTC* v. *Motion Picture Adv. Service Co., Inc.*, 344 U.S. 392 (1953); *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357 (1965); *FTC* v. *Texaco Inc.*, 393 U.S. 223 (1968); *FTC* v. *Brown Shoe Co.*, 384 U.S. 316 (1966).

[9] As early as in 1923, Justice Cardozo looked to the Trade Commission to build up "a body of precedent which will fix the proprieties of commercial usage." Cardozo, *The Growth of the Law*, 126 (1924). In Judge Learned Hand's words, the Trade Commission's powers "are not confined to such practices as would be unlawful before it acted" and its duty is to "discover and make explicit those unexpressed standards of fair dealing which the conscience of the com-

the Trade Commission articulate the basis upon which the practice was found to be unfair (405 U.S. at 248).

What then are the standards against which the challenged practice in this case may be judged? In *S&H*, the Court adumbrated a broad and expansive approach: "in measuring a practice against the elusive, but congressionally mandated standard of fairness, [the Commission], like a court of equity, [consider] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." (405 U.S. at 244). Two things are clear. First, the Trade Commission may proceed on equitable principles, like a court of equity.[10] Second, the Commission may consider "public values." [11]

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munity may progressively develop." *Federal Trade Commission* v. *Standard Education Soc.*, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd on other grounds*, 302 U.S. 112 (1937).

[10] It is elementary that equitable principles is essentially based on general grounds of morals and the community's sense of decency and fair play. See Maitland, *Equity*, 1-11 (1909); Main, *Ancient Law*, 27-28, 65-66, 401 (notes by Pollock) (Beacon Paperback Ed. 1963); Pound, *An Introduction of the Philosophy of Law*, 57-58 (1922). More than two millenia ago, Aristotle articulated the ethical basis of equity. *Nicomachean Ethics*, V, 11; *Rhetoric*, I, 13. It is of interest to note a parallel between Aristotle's concept of equity (*Rhetoric*, I, 13) and the organic concept of "unfair methods of competition" and "unfair practices" embodied in Section 5 of the Federal Trade Commission Act. See *Federal Trade Commission* v. *Motion Picture Adv. Service*, 344 U.S. 392, 394-395 (1953); *S&H*, *supra*, 405 U.S. at 244.

[11] In *S&H*, (405 U.S. at 244-245, n. 5), the Court accepted without comment the factors the Trade Commission consid-

Applying the Court's broad guidelines to the instant case, the well-recognized principle of confidentiality of individual income tax information is clearly a valid standard in the circumstances of this case. The confidentiality principle has long been incorporated into the codes of ethics of the legal and accounting professions. Congress long ago established the public policy regarding confidentiality of income tax information (26 U.S.C. §§ 6103, 7213). In 1971, it was made a statutory command to tax preparers, backed by federal criminal sanction. Furthermore, the record is clear that customers of the so-called commercial tax preparers, such as Beneficial, did expect tax preparers to be bound by the principle

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ers in determining whether a practice is unfair, as stated in the Commission's 1964 *Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking.* These factors were:

> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)."

The standards set forth in (2) clearly show that the Trade Commission may prohibit as unfair to consumers, a practice that has not been proscribed by the common or statutory law or judicial decisions. See Note "Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Redefined", 26 Rutgers L. Rev. 427, 433 (1973).

before 1972 (Finding 69). Respondents' argument that commercial tax preparers were not expected to adhere to this principle at all, or not as strictly as lawyers and accountants until the Revenue Act of 1971, would astound their tax customers as well as the general public. In these circumstances, the use by Beneficial of confidential individual income tax information, obtained ostensibly for the purpose of income tax preparation, for the purpose of soliciting or making consumer loans to the same customer is offensive to the public policy, unethical, unscrupulous, unconscionable and clearly unfair to the consumer.[12]

It cannot be gainsaid that the so-called commercial income tax preparers, such as Beneficial, provide a service very much in demand by the consumer. They

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[12] In this connection, it is significant to note the evolving concept of unconscionability codified in Section 2-303 of the *Uniform Commercial Code*, which Congress has adopted for the District of Columbia (D.C. Code Ann. Art. 28 (1967)). It is generally recognized that this section reflects in part the congressional concern for consumer interests and a public policy of vindicating interest where justice requires. A comment to that section of the *Uniform Commercial Code* states that "the principle is one of the prevention of oppression and unfair surprise", *Uniform Commercial Code* § 2-302, Comment 1. Commentators have suggested that, in developing the standards of unconscionability, the courts should not only look to established common law concepts of unfairness but "pass directly on the unconscionability of the contract." *Id.* Also see generally Note "Unconscionable Contracts: The Uniform Commercial Code", 45 Iowa L. Rev. 843 (1960); Leff, "Unconscionability and the Code—The Emperor's New Clause", 115 U. Pa. L. Rev. 485 (1967); Note, "Section 5 of the Federal Trade Commission Act—Unfairness to Consumers", 1972 Wis. L. Rev. 1071, 1094-1095.

perform a legitimate and highly useful function. However, respondents do not contend that the trade realities peculiar to the commercial tax preparation business are so compelling as to require that the deep-rooted concept of confidentiality of individual income tax information yield to them or be modified in some way.[13] Nor is there any basis for such an argument in this record. The ultimate product of commercial civilization need not be abandonment of all traditional values.

That breach of confidence in fact occurred in this case was due to the peculiarities of Beneficial's own business operations, namely (1) combination of the tax preparation business and consumer loan business and (2) use of confidential tax information for the purposes of Beneficial's loan business. The record indicates that historically Beneficial entered the tax preparation business mainly as a means of augmenting its consumer loan business (Findings 53-54). In a manner of speaking, therefore, the danger of breach of confidence with respect to tax information was inherent both in the purpose and implementation of Beneficial's business plan from its inception. In this

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[13] Needless to say, business realities are highly relevant to Section 5 analysis. See dissenting opinion of Brandeis', J. in *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, at 434-437 (1920); *Federal Trade Commission* v. *Keppel Bros., supra*, 291 U.S. at 314. In the broadest sense, it has long been recognized that the law cannot long resist the needs of economic life that is strong and just. Cardozo, *The Growth of the Law*, 118 (1924). See also Holmes, *The Common Law*, 5 (Belknap Ed., 1963); *Collected Legal Papers*, 187 (1920); Cardozo, *The Nature of Judicial Process*, 61-62 (1921).

sense, it is arguable that the mere combination of tax preparation and consumer loan business under the same roof and common management of Beneficial may raise a Section 5 question for every such combination contains a seed of very real danger that the confidentiality may in fact be breached. This issue was eliminated by complaint counsel from this case (March 13, 1974 Admissions, paragraph 20) and the administrative law judge has, of course, no occasion to make a determination of this issue one way or the other. However, it is beyond question that the *actual* use of tax information obtained in the tax preparation business for the purposes of soliciting or making consumer loans of any kind by Beneficial including the so-called tax refund loan,[14] is a violation of the well-organized principle of confidentiality and is clearly unfair to consumers within the meaning of Section 5.

It should be stressed that the administrative law judge does not hold the challenged practice to be unfair simply because it is unethical. Whether a practice is morally or ethically objectionable in a general way is the beginning, not the end, of a Section 5

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[14] The record is replete with evidence tending to show that (1) the customers responding to Beneficial's "Instant Refund" advertisement were solicited for general consumer loans and, in some instances, for consolidation loans, both totally unrelated to the amounts of income tax refunds due them and (2) the financial information furnished by the customer in the course of the income tax preparation phase was used by Beneficial for the purpose of soliciting these unrelated loans (Findings 60, 66).

analysis. Here, the determination that the challenged practice is unfair with the meaning of Section 5 is not simply based on the fact that it is repugnant to some broad ethical desiderata, such as the need to protect personal privacy of individuals. Rather, it is based on a particularized standard, befitting the particular fact situations of this case, namely, the unauthorized use of confidential individual income tax information, ostensively obtained for the purpose of income tax preparation, for the purpose of soliciting or making consumer loans. What is being condemned is the essentially exploitative and unscrupulous misuse of confidential information in a breach of fiduciary relationship involved in this case. As Justice Cardozo observed long ago, Section 5 requires that "the careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 79 (1933). Therefore, respondents' arguments that there is no established public policy with respect to the protection of personal privacy in general or that personal privacy is routinely disregarded in the conduct of some businesses, such as the direct mailing industry and the sale of various mailing lists, do not save respondents' challenged act from Section 5's proscription.[15]

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[15] Complaint counsel forcefully argue that there is an established public policy of protecting personal privacy and the right of an individual to control the dissemination of information of personal nature. The administrative law judge

Trade Commission's Section 5 Jurisdiction and Section 316 of the 1971 Revenue Act

With respect to Section 316 of the Revenue Act of 1971 (26 U.S.C. § 7216), respondents further argue that that Revenue Code provision is directed precisely at conduct of the type alleged in Paragraphs Eight and Nine of the complaint, and that this legislative enactment has the effect of precluding the Trade Commission from taking any action against respondents under Section 5 of the Federal Trade Commission Act. These arguments are without merit.

Firstly, the Revenue Act of 1971 does not expressly repeal any of the provisions of the FTC Act. Nor does it give tax preparers an express exemption from Section 5 of the Federal Trade Commission Act. And "[i]mmunity from the antitrust laws is not lightly implied." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348 (1963). This well-established principle applies to the Federal Trade Commission Act, which was designed to supplement and bolster the Sherman and Clayton Acts by reaching not only existing violations of them, but trade practices which conflict with their basic policies as well as those

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agrees that a broad principle of protecting privacy has evolved gradually during the past 40 years. In general, however, the courts and Congress have engrafted numerous exceptions based on their notion of a balancing of conflicting interests in particular situations. The instant case is clearly governed by a deep-rooted and particularized public policy regarding the confidentiality of income tax information and there is no need to invoke the broader emerging concept of privacy.

which are unfair to competitors or consumers. *S&H*, *supra*, 405 U.S. at 245-246. Cf. *United States* v. *Western Pacific R. R. Co.*, 352 U.S. 59, 63-65 (1956).

Secondly, the Trade Commission's instant proceeding in no way invades the exclusive jurisdiction of the courts to enforce the criminal sanctions prescribed by the Revenue Code. Rather, this is simply another instance where Congress provided for concurrent jurisdictions with cumulative remedies. The Trade Commission's jurisdiction and power to enforce the Federal Trade Commission Act has been consistently sustained against challenges that statutes enforced by other agencies should be construed to preclude such jurisdiction. See e.g., *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, *supra*, 143 F.2d at 679. See also *Irwin* v. *Federal Trade Commission*, 143 F.2d 316, 325 8th Cir. 1944); *Waltham Watch Co.* v. *Federal Trade Commission*, 318 F.2d 28, 31-32 (7th Cir. 1963), *cert. denied*, 375 U.S. 944; *Brandenfels* v. *Day*, 316 F.2d 375, 378 (D.C. Cir. 1963); *cert. denied*, 375 U.S. 824; *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757 (6th Cir. 1966), 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

It is also well settled that a party may be subject to simultaneous jurisdiction by more than one agency under different statutes. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948); *United States* v. *RCA*, 358 U.S. 334, 343-344 (1959); *United States* v. *Borden Co.*, 347 U.S. 514 (1954); *Safeway Stores, Inc.* v. *Freeman*, 369 F.2d 952, 957 (D.C.

Cir. 1966). Similarly, courts have consistenly held that concurrent Food and Drug Administration-Trade Commission proceedings involving the same issues are proper, and that the statutory remedies of the two agencies are cumulative and not mutually exclusive. *United States* v. *1 Dozen . . . Boncquet Tablets*, 146 F.2d 361 (4th Cir. 1944); *United States* v. *Five Cases . . . Capon Springs Water*, 156 F.2d 493 (2d Cir. 1946). Furthermore, in cases where the Trade Commission has concurrent jurisdiction under different statutes, the enforcement standards of the Federal Trade Commission Act may also be different. See e.g., *Brandenfels* v. *Day, supra; American Cyanamid Co.* v. *Federal Trade Commission, supra;* and the FDA cases cited hereinabove. This is such a case.

In view of the foregoing discussion, respondents' argument that their use of the so-called BOR-56 consent form fully complies with the requirements of Section 316 of the 1971 Revenue Act, a question the administrative law judge has no occasion to decide, is entirely irrelevant to this Section 5 proceeding. For our purposes, it is enough that the present BOR-56 consent form, together with the manner in which it was used by respondents, is not sufficient to cure the unfairness at issue here (Findings 65-67).

The Liability of Beneficial Corporation

We need dwell on respondents' argument that Beneficial Corporation, a holding company which owns and controls the Beneficial loan and tax service subsidiaries, is not liable for the practices challenged in

this proceeding. The record is abundantly clear that Beneficial Corporation, in addition to its control by ownership, in fact exercises an absolute control over the affairs of its operating subsidiaries, which it collectively calls the Beneficial Finance System, not only through a pervasive web of interlocking directorates and managements but also through its absolute power of the purse (Findings 21, 23, 30, 31). Indeed, the "Instant Tax Refund" slogan, which respondent so strenuously insist on retaining for continued use, has been copyrighted by Beneficial Corporation itself (Finding 28). It is well settled that those who place in the hands of others the instrumentality by which unfair or deceptive acts are accomplished may be held responsible for these practices. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922).

THE REMEDY

It is well settled that the Trade Commission has broad discretion in fashioning an appropriate remedy once a Section 5 violation is found in order to ensure discontinuance of the condemned act. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 (1957); *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965). The Commission's discretion in this respect is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob*

Siegel Co. v. *Federal Trade Commission*, 327 U.S. 608, 613 (1946); *OKC Corp.* v. *Federal Trade Commission*, 455 F.2d 1159 (10th Cir. 1972).

Complaint counsel have proposed an order which, except for a few modifications, is substantially similar to the notice order which was attached to the complaint.

Respondents urge two reasons why in their view the imposition of any order would not be in the public interest: (1) discontinuance and (2) the enactment of the 1971 amendment to the Internal Revenue Code. In the administrative law judge's view, they are invalid and should be rejected.

A. *Discontinuance*

Respondents' argument that the misleading advertisements ceased years ago and that, therefore, no order need be entered is contrary to the administrative law judge's conclusion, elaborated hereinafter, that only the excision of the "Instant Tax Refund" slogan will provide adequate protection. *Infra*, pp. 42-44. In any event, it is well settled that discontinuance or abandoment of the offending practice does not render a cease and desist order improper. The statutory scheme of the Federal Trade Commission Act clearly contemplates the issuance of an appropriate order in order to protect the public from any resumption of the unfair practices without further resort to the statutory sanctions available for future enforcement. *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F.2d 838 (7th Cir. 1961);

Benrus Watch Co. v. *Federal Trade Commission*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Montgomery Ward Co.* v. *Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967); *Doherty, Clifford, Steers & Shenfield, Inc.* v. *Federal Trade Commission*, 392 F.2d 921 (6th Cir. 1968).

B. *The Revenue Act of 1971*

Respondents next contend that, because the use of individual income tax information by commercial tax preparers for any purpose other than the preparation of tax returns of their clients has been made a criminal offense by Section 316 of the Revenue Act of 1971 (26 U.S.C. § 7216), there is no longer any need for the Trade Commission to issue a cease and desist order against unauthorized use by Beneficial of confidential income tax information for the purpose of soliciting or making consumer loans in the future. This argument is without merit for the same reasons discussed hereinabove in connection with the Commission's Section 5 power to proceed in this case. Essentially, the Commission's remedy is cumulative, and not mutually exclusive with the statutory remedy provided for by the Revenue Code. *Supra*, pp. 39-40. Furthermore, the Trade Commission has a broad equitable power to prescribe a more stringent or different remedy than that provided for by the Revenue Act of 1971, or the regulations promulgated thereunder, in order to adequately protect the consumer. In the final analysis, therefore, respondents' argument in this respect is directed to the Commis-

sion's discretion. And, on the basis of this record, the administrative law judge concludes that the issuance of a cease and desist order is necessary and proper.

C. *Provision Against the Use of "Instant Tax Refund" Slogan*

Complaint counsel assert that nothing short of an outright prohibition against further use of the "Instant Tax Refund" slogan, or any variation thereof, would provide an adequate remedy in the circumstances of this case. They stress that mere insertion of an explicit qualifier or other explanatory language in advertisements containing the "Instant Tax Refund" slogan will not do. Respondents vigorously claim that the "Instant Tax Refund" slogan, which is a registered trademark and has been heavily promoted by them over the past few years, constitutes a valuable proprietary right, that the insertion of explicit and appropriate phrase stating that what is being offered is a loan in reasonable proximity of the slogan would adequately cure the alleged deception, and that under the circumstances, the extreme and harsh remedy of an outright ban against any use of the slogan would be unreasonable, arbitrary and capricious and a violation of due process. The administrative law judge is of the view that the same reasons which render unfair and deceptive the post-February 1970 "Instant Tax Refund" advertisements discussed hereinabove, compel the conclusion that further use of the deceptive slogan should be pro-

hibited. See *supra*, pp. 26-28. Furthermore, it is well settled that qualifying language that is contradictory to the deceptive trade name cannot be used. *Federal Trade Commission* v. *Army and Navy Trading Co.*, 88 F.2d 776, 780 (D.C. Cir. 1937); *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F.2d 429 (4th Cir. 1939); *Bakers Franchise Corp.* v. *Federal Trade Commission*, 302 F.2d 258, 262 (3d Cir. 1962); *Resort Car Rental System Inc.* v. *Federal Trade Commission*, —— F.2d —— (July 31, 1973). This is such a case. See *supra*, p. 28.

For the same reason, respondents' argument that their proprietary right in the slogan should be respected by the Commission must be rejected. As Justice Cardozo so aptly put it in a leading case, to cling to a benefit which is the product of misrepresentation, however innocently made, would constitute "a kind of fraud." Respondents must extricate themselves from it by purging their advertisement of the offending slogan. Under the circumstances, only a complete excision of the "Instant Tax Refund" slogan or any variation thereof, can provide an adequate protection. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 81 (1934).

Furthermore, the "Instant Tax Refund" slogan is calculated to exploit the common and natural desire of taxpayers to get back from the government as speedily as possible any money they may have paid above and beyond what they actually owe in taxes. In this sense, the slogan is more than simply deceptive and misleading. It is, in a real sense, ex-

ploitative. See *supra*, pp. 30, 37. In these circumstances, it would be unthinkable to permit respondents to continue to use the "Instant Tax Refund" slogan or any variation thereof in their future advertisements.

D. *The Requirements for a Consent Form*

Complaint counsel have proposed detailed requirements for a consent form which may be used by respondents in order to cure the deceptive and unfairness of their practices condemned herein. In the administrative law judge's view, these requirements are reasonably related to the violation found and appear to be designed to protect the consumers adequately in the circumstances of this case. These requirements will therefore be adopted by the administrative law judge.

E. *The Provision Requiring Respondents to Send a Letter to their Tax Service Customers for the Most Recent Year*

Complaint counsel have also proposed an order provision which would require respondents to send a letter explaining the terms of the cease and desist order entered in this case to the last known address of each of their tax preparation customers for the most recent tax years. Indeed, respondents have contended that the "Instant Tax Refund" slogan has been identified by the consumer with Beneficial and that it constitutes a valuable proprietary interest. It is arguable, therefore, that something more than

mere prohibition of the offending advertisements is required in order to counter the residual effects of these advertisements. It is beyond question that the Trade Commission has the power to require corrective advertisement as a part of an affirmative remedy where appropriate. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78 (1934); *American Cyanamid* v. *Federal Trade Commission*, 401 F.2d 574 (1968); *cert. denied*, 394 U.S. 920 (1969). Nevertheless, the administrative law judge is of the view that the record evidence does not justify a provision for corrective advertisement in this case. First, Beneficial's use of the offending advertisements has been of a relatively recent origin. It started some 4 years ago (Findings 41). Second, the advertising campaign using the offending slogan has been largely seasonal, limited to the income tax season. Finally, the administrative law judge is concerned with the possibly counterproductive effects corrective advertisements may have upon those consumers who have never been exposed to Beneficial's "Instant Tax Refund" advertising campaigns. In this sense, any requirement for corrective advertisements may very well operate to dilute the central provision of the remedy in this case, namely, the excision of the "Instant Refund" slogan or any variation thereof from the future advertisements of Beneficial. For these reasons, the administrative law judge does not include a corrective advertisement provision in the Order.

The administrative law judge rejects complaint counsel's argument that respondents be required to send a letter explaining the terms of the Order to respondents' past tax customers. The necessity for and utility of such a notification letter is highly dubious. In the administrative law judge's view, the most effective protection that can be devised for respondent's tax preparation customers in this case is a total ban against the use of the "Instant Tax Refund" slogan by respondents in the future. This is adequate in the circumstances of this case.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has, and has had jurisdiction over respondents, and the acts and practices charged in the complaint and involved herein, took place in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Respondents Beneficial Corporation and Beneficial Management Corporation are jointly responsible for the unlawful acts and practices committed in this case and both are subject to the Order issued herein.

3. Respondents have engaged in false, misleading and deceptive advertising.

4. Respondents' use of information gathered as a result of their preparation of customers' tax returns for purposes other than the preparation of those tax returns is false, misleading, deceptive and unfair.

5. The use by respondents of the aforesaid false, misleading and deceptive advertising and deceptive and unfair acts and practices has had, and now has,

the capacity and tendency to mislead members of the public into the purchase of respondents' income tax preparation services, and were and are to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

6. The Order set forth below is the necessary and appropriate relief in this case.

As a consequence of the foregoing and of the findings of fact set out above, the following Order is entered:

ORDER

IT IS ORDERED that respondents Beneficial Corporation and Beneficial Management Corporation, corporations and their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the preparation of income tax returns or the extension of consumer credit in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "instant tax refund", or any other word or words of similar import or meaning.

2. Using any guarantee without clearly and conspicuously disclosing the terms, conditions and limitations of any such guarantee; or mis-

representing, in any manner, the terms and conditions of any guarantee.

3. Representing, directly or by implication, that respondents will reimburse their customers for any payments the customer may be required to make in addition to his initial tax payment, in instances where such additional payment results from an error by respondents in the preparation of the tax return.

4. Failing to disclose, clearly and conspicuously, whenever respondents make any representation, directly or by implication, as to their responsibility for, or obligation resulting from, errors attributable to respondents in the preparation of tax returns, that respondents will not reimburse the taxpayer for any deficiency payment assessed against the taxpayer which results from the said errors.

5. Representing, directly or by implication, that the percentage of respondents' customers who receive tax refunds is demonstrably greater than the percentage of the tax paying public at large who receive refunds; or misrepresenting, in any manner, the magnitude or frequency of refunds received by respondents' tax preparation customers.

6. Representing, directly or by implication, that respondents' tax preparing personnel are specifically trained or unusually competent in the preparation of tax returns and the giving of

tax advice; or that they have the ability and capacity to prepare and give advice concerning complex and detailed income tax returns; or misrepresenting, in any manner, the competence or ability of respondents' tax preparing personnel.

7. Using any information concerning any customer of respondents, including the name and/or address of the customer, for any purpose which is not essential or necessary to the preparation of a tax return if such information was obtained by respondents as a result of the preparation of the customer's tax return which includes any information given by the customer after he has indicated, in any way, that he is interested in utilizing respondents' tax preparation services, unless prior to obtaining such information respondents have both (1) specifically requested from the customer the right to use the tax return information of the customer and (2) have executed a separate written consent signed by the customer which shall contain:

1. Respondent's name
2. The name of the customer
3. The specific purpose for which the consent is being signed
4. The exact information which will be used
5. The particular use which will be made of such information

6. The parties or entities to whom the information will be made available

7. The date on which such consent is signed

8. A statement that the tax return information may not be used by the tax return preparer for any purpose other than that stated in the consent, and

9. A statement by the taxpayer that he consents to the use of such information for the specific purpose described in subparagraph (3) of this paragraph.

Nothing in the above provision is intended to relieve respondents of any further requirements imposed on them by the Revenue Act of 1971, Pub. L. 92-178, title III, § 316(a) December 10, 1971; 26 U.S.C. § 7216 or regulations issued pursuant to it.

IT IS ORDERED that respondents herein shall notify the Commission at least 30 days prior to any proposed change in the structure of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent corporations which may affect compliance obligations arising out of this Order.

/s/ Montgomery K. Hyun
MONTGOMERY K. HYUN,
Administrative Law Judge.

October 21, 1974

APPENDIX E

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford
Stephen Nye

Docket No. 8922

In the Matter of

BENEFICIAL CORPORATION, a corporation, and
BENEFICIAL MANAGEMENT CORPORATION,
a corporation

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the initial decision; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission, for reasons stated in the accompanying Opinion, having denied in part and granted in part the appeal; accordingly

IT IS ORDERED that, except to the extent that it is inconsistent with the Commission's Opinion, the Initial Decision of the Administrative Law Judge be, and it hereby is, adopted together with the Opinion accompanying this Order as the Commission's final findings of fact and conclusions of law in this matter;

IT IS FURTHER ORDERED that the following cease and desist order be, and it hereby is, entered:

IT IS ORDERED that respondents Beneficial Corporation and Beneficial Management Corporation, corporations, and their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the preparation of income tax returns or the extension of consumer credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "instant tax refund," or any other words or words of similar import or meaning.

2. Using any guarantee without clearly and conspicously disclosing the terms, conditions and limitations of any such guarantee; or misrepresenting, in any manner, the terms and conditions of any guarantee.

3. Representing, directly or by implication, that respondents will reimburse their customers for any payments the customer may be required to make in addition to his initial tax payment, in instances where such additional payment results from an error by respondents in the preparation of the tax return, provided, however, that it shall be a defense in any enforcement proceeding for respondents to establish that they make such payments.

4. Failing to disclose, clearly and conspicuously, whenever respondents make any representation, directly or by implication, as to their responsibility for,

or obligation resulting from, errors attributable to respondents in the preparation of tax returns, that respondents will not reimburse the taxpayer for any deficiency payment which results from said errors, provided, however, that it shall be a defense in any enforcement proceeding for respondents to establish that they make such payments.

5. Representing, directly or by implication, that the percentage of respondents' customers who receive tax refunds is demonstrably greater than the percentage of individual taxpayers at large who receive refunds; or misrepresenting, in any manner, the magnitude or frequency of refunds received by respondents' tax preparation customers.

6. Representing, directly or by implication, that respondents' tax preparing personnel are tax experts or unusually competent in the preparation of tax returns or the rendering of tax advice; or misrepresenting, in any manner, the competence or ability of respondents' tax preparing personnel.

7. Using information concerning any customers of respondents, including the name and/or address of the customer, for any purpose which is not essential or necessary to the preparation of a tax return if such information was obtained by respondents as a result of the preparation of the customer's tax return which includes any information given by the customer after he has indicated, in any way, that he is interested in utilizing respondents' tax preparation services, unless prior to obtaining such information respondents have both (1) specifically requested

from the customer the right to use the tax return information of the customer and (2) have executed a separate written consent signed by the customer which shall contain:

1. Respondent's name
2. The name of the customer
3. The specific purpose for which the consent is being signed
4. The exact information which will be used
5. The particular use which will be made of such information
6. The parties or entities to whom the information will be made available
7. The date on which such consent is signed
8. A statement that the tax return information may not be used by the tax return preparer for any purpose other than that stated in the consent, and
9. A statement by the taxpayer that he consents to the use of such information for the specific purpose described in subparagraph (3) of this paragraph;

Provided, however, that nothing herein shall prohibit respondents from using names and addresses only of customers for the purpose of communication with such customers solely concerning respondents' income tax preparation business.

Nothing in the above provision is intended to relieve respondents of any further requirements imposed on them by the Revenue Act of 1971, Pub. L. 92-178, title III, § 316(a), December 10, 1971; 26 U.S.C. § 7216 or regulations issued pursuant to it.

IT IS FURTHER ORDERED that respondents herein shall notify the Commission at least 30 days prior to any proposed change in the structure of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent corporations which may affect compliance obligations arising out of this Order.

IT IS FURTHER ORDERED that respondents shall, within 60 days after service of this Order, file with the Commission a written report, signed by the respondents, setting forth in detail the manner and form of their compliance with this Order.

By direction of the Commission.

/s/ Charles A. Tobin
CHARLES A. TOBIN

Issued: July 15, 1975

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 228010 53

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1088.

FEDERAL TRADE COMMISSION,

Petitioner,

v.

BENEFICIAL CORPORATION AND BENEFICIAL MANAGEMENT CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION.

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IN THE

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OCTOBER TERM 1976.

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No. 76-1088.

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FEDERAL TRADE COMMISSION,
Petitioner,

v.

BENEFICIAL CORPORATION AND BENEFICIAL MANAGEMENT CORPORATION,
Respondents.

—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

—

BRIEF OF RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals, attached to the Petition for a writ of Certiorari (the "Petition") as Appendix A (A1a-30a),[1] is reported at 542 F. 2d 611 (3d Cir. 1976). Leave to file an untimely petition for reargument was denied on November 19, 1976. The decision (A35a-140a) and order (A141a-145a) of the Federal Trade Commission (the "Commission") are reported at 86 F. T. C. 119.

1. All references herein to an appendix ("A-") are references to the appendices to the Petition.

JURISDICTION.

The statement of jurisdiction set forth in the Petition is adequate.

QUESTIONS PRESENTED.

1. Whether or not the Court should grant the Petition to review a judgment of the Court of Appeals which judgment is not final because that part of the Commission's order which was not affirmed was remanded to the Commission for further proceedings.

2. Whether or not the decision of the Court of Appeals should be reviewed by this Court where the Court below applied established precedent in requiring the Commission to consider the feasibility of explanatory material in lieu of an order requiring total excision of the phrase, "instant tax refund" and other "words of similar import."

STATUTE INVOLVED.

Section 5(a) and (b) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45(a) and (b), are reproduced at page 3 of the Petition.

STATEMENT.

The portion of this litigation which is sought to be reviewed involves the advertising by Beneficial [2] of its personal loan services to the public during that portion of the year when federal income tax returns are prepared and filed with the government.

Beneficial, since its inception, has been in the business of making loans through its loan office subsidiaries to members of the public based upon the credit-worthiness of the applicants (A77a-78a).

Commencing in the spring of 1969 Beneficial developed and implemented a program of preparing income tax returns in its loan offices (A89a; 100a). Beneficial entered the field of preparing income tax returns beginning in the 1970 tax season.

The initial decision to enter this field was based on the belief that those who visited loan offices to have their income tax returns prepared and who desired or needed funds to pay taxes would find it convenient to borrow such funds from Beneficial (A100a). Since most taxpayers receive refunds from the government, Beneficial decided to advertise a loan providing the immediate use of the money to anticipate a tax refund and to eliminate the need to await a check from the government. Since the inception of the program, Beneficial's copyrighted advertising theme has centered around the "instant tax refund" loan (A91a).

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2. Respondent Beneficial Corporation is a holding company (A77a-78a). Approximately 1,500 small loan offices of the Beneficial Finance System are operated in the United States by wholly-owned subsidiaries of Beneficial Corporation (A78a-80a). Respondent Beneficial Management Corporation is a wholly-owned subsidiary of Beneficial Corporation and provides services to the operating subsidiaries (A79a). Respondents will be referred to in this brief as "Beneficial".

Beneficial has continually and voluntarily re-evaluated, modified and changed its advertising to clarify adequately the instant tax refund loan concept, such steps having been taken prior to the institution of the present action by the Commission (see, A89a-97a).[3]

The Commission commenced the present action with the filing of an administrative complaint against Beneficial on April 10, 1973. Beneficial did not dispute the fact that the instant tax refund loan is part of Beneficial's usual loan service based on the credit-worthiness of the borrower. In this respect, the loan is like other loans normally advertised in the industry, such as a "pay day loan", "vacation loan", "billpayer loan" or the like. These advertised loans, like the "instant tax refund" loan, are not deceptive when the prospective borrower is informed of a purpose for which he may wish or need to borrow. Here the purpose is to permit a borrower to anticipate a refund.

The Administrative Law Judge, without considering whether a remedy less drastic than excision would provide adequate protection to the public, concluded that excision of the phrase must be ordered (A133a). In so ruling, he reasoned that since Beneficial's past use of the "instant tax refund" loan advertising had been misleading, and its past attempts at qualification of the language found to have been wanting, then, *a priori*, any future use of the language was prohibited (see, A132a-134a; compare, A110a-112a [finding that Beneficial's past attempts to qualify the language had not been effective]). Moreover, he injected into his conclusion the theory that excision had a

3. The Commission quotes Beneficial's earliest form of advertising in its Petition (Petition, pp. 3-4). However, the relevance of such advertising, putting aside the fact that this form of advertising was used for only a brief period of time as a pilot program, is questionable in view of the Commission's duty to consider, as an alternative to excising the "instant tax refund" loan language, possible future methods of qualifying that language.

punitive and purgative effect, and was thus justified on that basis as well (A133a). He ordered Beneficial to cease and desist from using the term "instant tax refund" or "any other word or words of similar import or meaning" (A137a).

In affirming the decision of the Administration Law Judge, the Commission gave equally perfunctory consideration to remedies less drastic than excision. The Commission adopted the Administrative Law Judge's theory that Beneficial's past unsuccessful efforts at qualifying the term had prejudiced any future attempts at qualification (A36a). The Commission refused to consider seriously a remedy less drastic than excision. Thus, the Commission refused to follow the rule established by this Court in *Federal Trade Commission v. Royal Milling Company*, 288 U. S. 212 (1933), *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608 (1946) and related cases. As to these authorities, the Commission stated:

> "Though we believe the *Royal Milling* line of cases is compatible with our normal responsibility to enter effective but not overbroad orders, to the extent it may actually be a limitation or exception to the Commission's authority to devise fully effective remedies, then we decline to expand the exception from trade names to advertising slogans. The Instant Tax Refund slogan is unlike the established company names in *Royal Milling*, for it is not the name of anything. It is an empty promotional phrase referring to nothing." (A54a).

The Court of Appeals remanded this cause to the Commission to consider whether a remedy less drastic than excision would provide adequate protection to the public (A33a). The basis for the remand was not, as the Com-

mission suggests, the adoption by the Court of Appeals of a new standard of judicial review (see, Petition, pp. 8-9). Rather, the Court based its decision on three distinct grounds. The Court concluded that the Commission exceeded its statutory authority under Section 5 as enunciated by this Court in *Jacob Siegel* and *Royal Milling* line of cases, in failing fully to consider rewritten advertising copy in lieu of excision (A19a).

Also the Court rejected the limiting construction which the Commission placed on *Jacob Siegel* and *Royal Milling* (A20a).[4] Finally the Court stated that ". . . the remedy for the perceived violation can go no further in imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective of preventing the violation." (A17a-18a).

4. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608 (1946) and *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933).

ARGUMENT.

I. The Issues Raised by the Petition Are Not Ripe for Decision.

The judgment of the Court of Appeals remands the cause to the Commission for thorough consideration of alternative remedies. Until this litigation has been terminated by a final order, review by this Court is premature. It is respectfully submitted that the Court in its discretion (*Wade v. Mayo*, 334 U. S. 672, 680 (1948) and Supreme Court Rule 19) should deny the Petition.

Although the Commission claims the contrary, the Court of Appeals has not held that excision may not be a proper remedy in appropriate cases; nor has it entered an order imposing any specific remedy on remand. It has merely remanded for full consideration of alternative remedies.

On remand, respondents expect the Commission, after full consideration, to agree that explanatory language can cure the alleged deception.[5] If the Commission so concludes, the proceeding will be ended by amended order of the Commission. The issue which the Commission seeks to have this Court review at this interlocutory stage will thus become moot. If the Commission does not so agree, the Court of Appeals will have jurisdiction to review the action of the Commission.

The Commission has lost sight of the fact that the basis for the Court of Appeals' decision was its conclusion that the Commission failed ". . . to consider fully the feasibility of requiring merely that advertising copy be rewrit-

5. While we do not concede that Beneficial's earlier advertising was deceptive, we do not seek review of that part of the judgment of the Court of Appeals which affirms the Commission's finding to that effect.

ten in lieu of total excision of the offending language . . ." (A19a, 542 F. 2d at 619). This is not a case where the Court of Appeals has invaded the primary jurisdiction of the Commission; it is not a case where the Court of Appeals has reversed the considered and thorough findings of an administrative agency. The limited scope of the Court of Appeals' decision is apparent from these excerpts:

> ". . . We do not believe that the Commission's conclusion as to the capacity of qualifying language to apprise Beneficial's audience of the true nature of the offered services can be sustained . . . .
>
> "It is now established beyond dispute that there is no commercial speech exception to the first amendment. . . . That does not mean that an advertiser may engage in speech that is an essential part of a scheme to violate an otherwise valid law. . . .
>
> "Even before the demise of *Valentine v. Chrestensen*, 346 U. S. 52 (1942), was heralded in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, and *Bigelow v. Virginia, supra*, the Supreme Court held that the Federal Trade Commission abused its discretion in ordering the excision from advertising of a valuable business asset like a trade name without considering whether modification of the message could eliminate the objectionable portion. *Jacob Siegel Co. v. FTC*, 327 U. S. 608 (1946); *FTC v. Royal Milling Co.*, 288 U. S. 212 (1933). . . .
>
> "In failing to consider fully the feasibility of requiring merely that advertising copy be written in lieu of total excision of the offending language, the Commission would appear to have exceeded its remedial

> authority under § 5 as shaped by the *Jacob Siegel-Royal Milling* line of cases. . . . We reject to limiting construction that the Commission attaches to *Royal Milling*. . . .
>
> "The Commission, like any governmental agency, must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of a deception. The Commission's order proscribing use of the term instant tax refund or any other word or words of similar import or meaning, without consideration of the context in which the words appear, went further than was permitted for that purpose and was an abuse of the Commission's remedial discretion. It cannot in that form and without such consideration be affirmed or enforced. . . ." (A17a-21a).

The Court has observed that the absence of a final decision is, in and of itself, a sufficient reason for the denial of a petition for a writ of certiorari. *Hamilton Shoe Co. v. Wolf Bros.*, 240 U. S. 251 (1916). In *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U. S. 327 (1967), a petition for a writ of certiorari was denied where, as here, the petitioner sought review of a non-final judgment remanding a cause for further consideration of certain factual issues relating to the question of remedy. In denying the petition, the Court observed:

> "Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for writ of certiorari is denied." 389 U. S. at 328.

The Commission, however, argues that it "explicitly considered whether something less than elimination of the deceptive phrase would suffice to protect the public, but justifiably concluded that any lesser remedy would be inadequate." (Pet., p. 11). This argument is without support. Rather than carefully considering whether an alternative remedy would suffice, the Commission concluded, without discussion of any specific alternative remedies and without any consideration of any evidence relevant thereto, that the phrase "instant tax refund" when used with any form of qualification is inherently deceptive (A54a-55a). The Commission did not even attempt to rest its order on its assessment of the possibility of adequate qualifying language. The Court of Appeals was well within established principles of law when it remanded the question of remedy for further consideration. See, *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U. S. 233, 248 (1972).

The cases cited by the Commission do not suggest a contrary result (Pet., p. 11). Beneficial will not burden the Court with an analysis of each specific case. Each of those cases is plainly distinguishable from the present case in that in each the Commission had considered remedies alternative to excision and had exercised its discretion in choosing an appropriate remedy. The record in the present case is barren of any evidence that alternative remedies were fully considered. For example, in *Carter Products, Inc. v. Federal Trade Commission*, 268 F. 2d 461 (9th Cir. 1959) cert. denied 361 U. S. 884 (1959), rehearing denied 361 U. S. 921 (1959) (Pet., p. 11), the Commission conducted in excess of 149 hearings, presented the Court of Appeals with voluminous evidence regarding its conclusions and carefully related the evidence to its conclusions in specific and careful findings of fact. In the present case the

Commission concluded without one shred of evidentiary support that the phrase "instant tax refund" could not be qualified and must be excised. Indeed, had the Court of Appeals affirmed the Commission on that basis, it would have acted in complete disregard of its statutory duty of supervision as established by *Jacob Siegel* and *Royal Milling*.[6]

II. The Decision Below Does Not Conflict With Decisions of This Court or Other Courts of Appeal; Nor Does It Present Significant Issues for Review.

The Commission ignores the provisions of Rule 19 (1)(b), which indicate the reasons for which a writ of certiorari will ordinarily be granted. None of the reasons fits the instant case. The decision below is simply an application of the principles governing the Commission for 44 years since the decision of this Court in *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933). Since *Royal Milling*, it has been well settled that "orders [of the Commission] should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public". *Id.*, at 217. The decision below does not conflict with any decisions of this Court nor with any decisions of any other courts of appeal.

The Commission argues that the Court of Appeals should have abdicated its responsibilities in reviewing decisions of the Commission and should have deferred totally to the Commission despite the fact that the Court found that the Commission had erred (Pet. pp. 9-13). The Commission relies heavily on statements of this Court in *Federal Trade Commission v. Royal Milling Co.* and *Jacob Siegel*

6. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608 (1946) and *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933).

v. Federal Trade Commission (Pet., pp. 10, 13).[7] However, both *Siegel* and *Royal Milling* enunciate the very reasons why the Petition should not be granted.

In *Royal Milling*, the Commission concluded that the respondents' tradenames, including the words "milling company", were deceptive in conveying the erroneous impression that the respondents were grinders, and held that the words "milling company" should be excised. This Court held that the tradenames were valuable business assets, the destruction of which would probably be highly injurious, and that excision should not be ordered if less drastic means would accomplish the same result. Although it did not disagree with the Commission's finding that "milling company" implied "grinder", the Court held that the qualifying language (*e.g.*, "Not Grinders of Wheat") used in immediate connection with the names would be sufficient to eliminate the deception. Applying this Court's mandated reasoning to the instant case requires that the instant tax refund loan advertising be permitted to continue with the addition of appropriate qualifying language. This has been done in decisions applying *Royal Milling*.

In *Jacob Siegel v. Federal Trade Commission*, 327 U. S. 608 (1946), the Court held that its earlier decision in *Royal Milling* continued to be controlling law and that a valuable business asset, such as a tradename, should be ordered excised only if less drastic means would not achieve the desired end. In that case, the tradename

7. The Commission's reliance on these decisions is somewhat curious since it also argues that the principles enunciated in *Royal Milling* (and, by necessity, *Siegel*) are not binding on the Commission (Pet. pp. 13-14, *n.* 10) when the Commission is reviewing advertising rather than tradenames as were involved in *Royal Milling* and *Siegel*. The Commission does not explain why it urges this Court to reverse the decision below based on these decisions and, at the same time, urges this Court to determine that these decisions are not binding on the Commission when it reviews advertising. The Commission cannot have it both ways.

"Alpacuna" was found by the Commission to be deceptive when applied to a fabric which contained no vicuna fleece. This Court remanded for consideration of the addition of qualifying language in lieu of excision. Upon remand, the Commission modified its order to allow use of "Alpacuna", provided that the constituent materials and fibres thereof were listed immediately following the name. *Jacob Siegel*, 43 F. T. C. 256, 259-60 (1946).

Many courts of appeal have recently applied this principle. In *Korber Hats, Inc. v. FTC*, 311 F. 2d 358 (1st Cir. 1962), the Court set aside a Commission order which prohibited a manufacturer of men's hats from using the word "Milan" on its labels because it implied that the hats were manufactured in Italy. The Court remanded "for a determination of whether an absolute proscription against the use of any variation of the term 'Milan' is required . . .". 311 F. 2d at 363. The Court held that if qualifying language on the label would eliminate any likely deception, then use of the word "Milan" with such qualifying language should be permitted. *Id.*

Similarly, in *Magnaflo Corporation v. FTC*, 343 F. 2d 318 (D. C. Cir. 1965), the Court remanded a Commission order for a determination of the proper remedy for deceptive advertising practices:

> "The Commission must give careful consideration to the possibility of qualification before concluding that no change short of excision of a trade name will protect the public adequately under the Act [citation omitted]. Where the complete destruction of a substantial private interest is at issue, ordinary fairness requires such care." 343 F. 2d at 320.

This principle has been applied by every court of appeals to consider the question. See, *e.g.*, *Regina Corporation v. Federal Trade Commission*, 322 F. 2d 765 (3d

Cir. 1963); *Elliott Knitwear, Inc. v. Federal Trade Commission*, 266 F. 2d 787 (2d Cir. 1959); *Alberty v. Federal Trade Commission*, 182 F. 2d 36 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 818 (1950); *Marco Sales Co. v. Federal Trade Commission*, 453 F. 2d 1 (2nd Cir. 1971); *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509 (7th Cir. 1946); *Federal Trade Commission v. Good-Grape Co.*, 45 F. 2d 70 (6th Cir. 1930); *Federal Trade Commission v. Cassoff*, 38 F. 2d 790 (2d Cir. 1930); *N. Fluegelman & Co. v. Federal Trade Commission*, 37 F. 2d 59 (2d Cir. 1930).

Jacob Siegel has also been applied in other instances where courts of appeals have modified orders which the Commission had issued in connection with advertising claims or advertising language. See, *Grove Laboratories v. Federal Trade Commission*, 418 F. 2d 489 (5th Cir. 1969) [advertising claim]; *Carter Products, Inc. v. Federal Trade Commission*, 186 F. 2d 821 (7th Cir. 1951) [advertising claim]; *Alberty v. Federal Trade Commission*, 182 F. 2d 36 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 818 (1950) [striking a Commission order requiring the addition of derogatory language to certain advertising]; *D. D. D. Corp. v. Federal Trade Commission*, 125 F. 2d 679 (7th Cir. 1942) [the Commission cannot require that an advertiser use the word "temporary" in connection with the relief that his product would supply]. This Court also recognized the applicability of *Royal Milling* and *Jacob Siegel* to advertising in *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U. S. 374 (1965).

The Commission's argument also ignores the fact that both the Administrative Procedure Act (5 U. S. C. § 706 (2)(A), (B) and (C)) and the Federal Trade Commission Act (15 U. S. C. § 45(c)) mandate the approach taken by the Court of Appeals in this case. This Court has stated:

> "Congress has imposed on [courts of appeal] responsibility for assuring that the [Commission] keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Court of Appeals." *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474, 490 (1951).

See, *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 167 (1962); *Gilbertville Trucking Co. v. United States*, 371 U. S. 115, 130-31 (1962).

Thus, the Court of Appeals did nothing more than follow established precedent and law in determining that the matter should be remanded to the Commission for a thorough and full investigation of remedies less drastic than total excision. Judge Friendly put the matter quite well in discussing the remand by federal courts of appeal to administrative agencies for consideration of difficult questions which are inadequately analyzed: "Have you given enough thought to your choice? Are you entirely sure the evil calls for . . . the drastic [remedy] you have chosen?" (Page 209.) "Conceivably, the Board will take the hint and rethink the basis of its decision; if not, the court will at least have the benefit of an explicated decision." Henry J. Friendly, "*Chenery* Revisited: Reflections on Reversal and Remand of Administrative Orders", 1969 *Duke L. J.* 199 at 208.

The second basis for the Petition is equally lacking in merit. The Commission argues (Pet. pp. 14-16) that the decision of the Court of Appeals did not proceed in accordance with the appropriate standards of review. The Commission also attempts to create the erroneous impression that the Court of Appeals held that the First Amend-

ment to the United States Constitution prohibits the Commission from regulating and prohibiting deceptive and untrue commercial speech (Pet. pp. 15-16). Clearly, Judge Gibbons did not so hold.

The Court of Appeals noted that this Court's decisions in *Bigelow v. Virginia*, 421 U. S. 809 (1975), and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), determined that commercial speech is entitled to First Amendment protection. However, the Court of Appeals noted that First Amendment protection does not permit an advertiser to violate an otherwise valid law (A18a).

Thus while the First Amendment was mentioned, the decision of the Court of Appeals was based upon an application of the time-honored *Jacob Siegel-Royal Milling* doctrine that the Commission can go no further than is reasonably necessary in its remedial decrees. This Court's decisions in *Bigelow* and *Virginia State Board* were merely referred to by the Court of Appeals as supportive of that doctrine when applied to commercial advertising. The First Amendment requires nothing more than that governmental agencies use reasonable care in issuing prior restraints. There is nothing new in this statement.

The views expressed herein by appellate counsel for the Commission with respect to the constitutional protection of advertising is contrary to the present view held by the Commission. The Commission's traditional view of the First Amendment was clearly stated in *Firestone Tire & Rubber Co.*, 81 F. T. C. 398, 472 (1972): "the First Amendment does not protect purely commercial advertising . . .". Thus it is not surprising that the Commission disposed of Beneficial's constitutional arguments in a footnote (A55a-56a). The Court of Appeals has remanded this action for a full consideration of whether alternative

remedies to excision are available since the Commission did not give any recognition to Beneficial's First Amendment arguments raised before the Commission.

Presumably on remand, the Commission will apply its current view of advertising and the First Amendment. That view seems now to be expressed in its recent opinion in *National Commission on Egg Nutrition*, – F. T. C. –, BNA, Anti-Trust & Trade Reg. Repts., 8-10-76, E-1, at E-9, where the Commission acknowledged that "the Supreme Court dispelled what doubts may have lingered that speech does not lose all constitutional protection merely because it is designed to offer something for sale . . .". The Commission further recognized (contrary to what it is asserting in the Petition at note 10, pp. 13-14), that there is "enormous public interest" in the "vigorous dissemination" of product information. The Commission gave careful consideration to the Constitutional arguments raised, contrary to its summary disposition in this case.[8] Thus, not only is the decision of the Court below in conformity with the decisions of this Court and other courts of appeals, it is in complete conformity with the most recent decisions of the Commission itself.[9]

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8. The decision by the Commission in *National Commission on Egg Nutrition* predated by approximately one month the decision of the Court below.

9. See also, the very recent opinion of Circuit Judge Butzner writing for the three-Judge District Court in *Health Systems Agency of N. Virginia v. Virginia State Bd. of Medicine*, 424 F. Supp. 267, 273 (E. D. Va. 1976), which struck down a restraint on medical advertising: "Undoubtedly, the state has a substantial interest in preventing the fraudulent or deceptive practice of medicine. . . . Nevertheless, the state cannot achieve its goals by unnecessarily broad encroachments on first amendment rights." And see, *Fur Information & Fash. Coun., Inc. v. E. F. Timme & Son, Inc.*, 364 F. Supp. 16, 22 (S. D. N. Y. 1973): "Even advertisers enjoy first amendments rights, . . . While Congress may limit such rights to prevent fraud, . . . such limitation must be drawn narrowly, so as to meet the perceived evil, without unnecessary impingement on the right of free speech."

Nonetheless, whatever is the ultimate scope of protection to be afforded commercial advertising, it is plain that, at a minimum, the First Amendment must assure that the right to communicate is not needlessly obstructed through careless failure adequately to weigh less drastic alternative remedies. This is nothing but a requirement of ordinary care and fairness; if the law required anything less, and unless the decision of the Court in *Virginia State Board of Pharmacy* is meaningless, commercial speech would enjoy no meaningful protection. Therefore, at a minimum the First Amendment requires that prior restraints on commercial expression be narrowly drawn and based upon a careful examination of less restrictive alternatives. Why should the Commission resist such manifestly fair and equitable ground rules in this case? Its approach is particularly baffling since such rules are required by the *Jacob Siegel* and *Royal Milling*[10] cases and by the standards applied by the Commission itself.

Finally, the Commission argues that the "issue" presented in the Petition is important to the Commission since a portion of its activity involves the regulation of advertising (Pet. pp. 16-17). As has been noted above, the Commission itself has already recognized that it now must consider First Amendment rights in reviewing commercial advertising. As also has been shown above, the requirement that the Commission fully consider all alternative remedies before requiring excision is a requirement with which the Commission has been living for 44 years.

The Commission exaggerates the importance of the decision below. The sole issue is whether or not the Commission abused its discretion in requiring excision when appropriate qualifying language was available. Each proceeding before the Commission involving the propriety of excision of advertising material turns upon its own particular facts rather than on a difference of governing law. The decision below was based upon firmly established guidelines and does not present issues of sufficient importance to warrant review by this Court.[11]

10. *Jacob Siegel v. Federal Trade Commission*, 327 U. S. 608 (1946) and *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933).

Couching the supposed importance of this decision in terms of the Commission's ability to carry out its statutory objective to "protect the public" does not add to the supposed importance of the decision. The Court has recently observed that it will not countenance unnecessarily injurious remedial orders even when invoked by the rhetoric of "statutory enforcement" and "public interest." See *Rondeau v. Mosinee Paper Corp.*, 422 U. S. 49, 61 (1975), setting aside an unnecessarily stringent order under the Securities Laws and stating: "the qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . .".

In summary, Congress has mandated that the courts of appeals assure that administrative remedies stay within reasonable grounds. *Burlington Truck Lines, Inc. v. U. S.*, 371 U. S. 156, 167 (1962):

11. The narrowness of the issues presented by this case, and the consequent inappropriateness of Supreme Court review, should be contrasted with a proposed trade regulation rule upon which hearings are now being held by the Commission. If adopted, the proposed rule would prohibit *per se* the use of all terms in the advertising of over-the-counter drugs, no matter how truthful and non-deceptive, which depart from a uniform lexicon of labeling terminology presently being promulgated by the Food and Drug Administration. 40 Fed. Reg. 52631 (November 11, 1975). Adoption of such a rule would obviously raise substantial First Amendment issues and represent an assertion of Commission authority going well beyond the formulation of a cease-and-desist order adequate to remedy alleged false or misleading advertising. In contrast, review of broad constitutional issues by the Court at this stage of the present litigation is premature and unwarranted.

"[Where t]here are no findings and no analysis . . . to justify the choice made, [there is] no indication of the basis on which the Commission exercised its expert discretion. We are not prepared and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. [citation] Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'"

The Court of Appeals acted well within the established standards which govern the judicial review of administrative action and its decision in this case does not unduly restrict the Commission's ability carefully to fashion appropriate remedies.

III. The Decision of the Court of Appeals Was Correct.

As has been shown above, the decision of the Court of Appeals is consistent with prior decisions both of this Court and other courts of appeal in holding that the Commission should not issue orders which go further than is reasonably necessary. An excision order issued by the Commission will not be affirmed if a less drastic means, such as requiring the addition of appropriate qualifying language, will accomplish the same result. The Court below correctly applied these principles.

The Commission erred as a matter of law in not properly applying *Jacob Siegel* and *Royal Milling*, and the error is continued in its Petition (Pet. pp. 13-14, n. 10), where it argues that *Jacob Siegel* and *Royal Milling* do not apply to advertising. In *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509 (7th Cir. 1946), the Commission prohibited the appellant from using the slogan "Lifetime Guarantee" or words of similar import in connection

with the sale of its pens unless the appellant would refrain from its requirement that a nominal service charge be paid for repairs. The Seventh Circuit, on the authority of *Jacob Siegel*, held that the order was overbroad. The Court modified the order of the Commission to permit explanatory language that a nominal service charge in a specified amount would be required in connection with repairs under the lifetime guarantee. See also the decisions cited at p. 14 *supra* for other examples of the principle of *Siegel* and *Royal Milling* being applied to advertising.

As the Commission tacitly concedes, Beneficial's instant tax refund loan advertising constitutes a property right [12] which has become an important and integral part of its business operations (A42a). Beneficial originated and extensively used such advertising, invested substantial sums of money therein, obtained copyright protection therefor, and regards its use as a valuable business asset A55a, 84a, 89a-92a).

The Commission contends that advertising is of no value and the government can issue restraints on advertising without affording careful treatment to respondents in proceedings before regulatory agencies. The Commission further contends that once it has undertaken to modify advertising, the courts must abdicate their responsibilities and adhere to governmental decisions to modify

12. The United States Constitution and the Copyright Act enacted pursuant thereto "accord . . . a property status to copyright". Nimmer, *Copyright*, § 3.1 at 6.7 (1963). The principle embodied in the Copyright Act is that "[t]he fruits of an author's labor [are] . . . deserving of the privileges and status of 'property' . . .". *Id.*, at 6.9. As the Court has stated, an unlimited copyright permits its owner to "preclude others from copying his creation for commercial purposes without permission". *Goldstein v. California*, 412 U. S. 546, 555 (1973). Beneficial's instant tax refund loan advertising has thus been accorded the privileges and status of property—property the use of which has become a valuable business asset. Through such usage, the "instant tax refund" loan has become substantially identified with Beneficial's business.

the written word without affording respondents a meaningful review of governmental actions. However, the law is that if a regulatory agency such as the Commission determines that advertising in its present form should not be disseminated further, it is incumbent upon the agency to afford the advertiser an opportunity to correct its advertising to make it both non-deceptive and effective.

The Commission, in arguing that *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933), is inapplicable to advertising (Pet. pp. 13-14, *n.* 10), states without the benefit of citation to any authority, that "prohibiting a particular advertising slogan ordinarily will be far less [harmful] than prohibiting use of a trade name". The views of the commentators are decidedly contrary. They point out the tremendous cost, both in social and economic terms, which may befall advertisers when their advertising materials are despoiled by federal regulatory agencies.[13] Also, this Court has noted ". . . advertising is

13. As Professor Richard Posner of the University of Chicago School of Law has recently stated:

> "[W]here sanctions are severe, the costs of their erroneous imposition tend to be quite high. An administrative agency cannot be expected to be wholly free from bias in favor of imposing sanctions in borderline cases, because its performance is likely to be judged by the number of remedial orders that it issues rather than by the impartiality of its processes. In these borderline cases, it may be inclined to err against respondents. These errors would be a source of heavy social costs if the Commission were empowered to impose punitive sanctions, which tend to be very costly to those on whom they are imposed." *Regulation of Advertising by the F. T. C.* (1973), page 32.

As Yale Law School's Professor Ralph Winter recently stated at the American Enterprise Institute's conference, "Issues in Advertising", June 10, 1976, transcript of proceedings, pages 12-13:

> "[T]he cost of advertising . . . regulation, may easily be understated . . . *that is, a mistake by the agency, the wrong rule, the wrong kind of policy, injures consumers in exactly the*

the *sine qua non* of commercial profits . . .". *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976).

Advertising is not a property right of little worth; rather, significant sums are spent in developing effective advertising. Many companies are completely dependent upon advertising for the sale of their products. Seemingly small and insignificant changes in advertising by governmental agencies can render the advertising ineffective and of little value to the advertiser.[14] As the opinion of the Court of Appeals pointed out, there is no difficulty in devising advertising of the instant tax refund loan which is both informative and non-deceptive:

> "Beneficial's everyday loan service can provide to regularly qualified borrowers an Instant Tax Refund Anticipation Loan whether or not the borrower uses our tax service."

or

13. (Cont'd.)

> *same way as fraud. It diminishes consumer satisfaction.*" (Emphasis added.)

Solicitor General Robert Bork expressed his agreement with Professor Winter in that same proceeding, transcript, pages 53-55:

> "We are accustomed, in discussing these matters, to look only at the evil to be cured and not at all the evil inherent in the cure. . . . *[T]here is the cost to consumers of regulatory mistakes and we can be certain that they will occur.*" (Emphasis added.)

14. Modern copy research (research on the actual effect upon readers of advertising messages) has established that even minor variations in the physical characteristics of advertisements may have significant impact upon the effectiveness of such advertisements. *See, e.g.*, Lucas and Britt, *Measuring Advertising Effectiveness* (1963), pages 3-21; *Advertising Performance as a Function of Print Ad Characteristics*, 7 *Journal of Advertising Research*, 20 (June, 1967). *See also*, Howard and Sheth, *The Theory of Buyer Behavior*, 357-366 (1969), stressing that layout, visual contrast, shape, and typeface, as well as other graphic elements, have important "connotative meanings" determinative of consumer attitudes.

"Beneficial's everyday loan service can provide to any regularly qualified borrower an instant loan in anticipation of his tax refund. We call it an Instant Tax Refund Anticipation Loan." (A19a).

There are numerous other examples which could be suggested. Each of these examples clearly states that Beneficial is offering its loan service to regularly qualified borrowers and each clearly states that the service being offered is a loan from Beneficial rather than a refund from the government. To argue that the language conveys the impression that a direct refund from the government is being offered or that persons other than regularly qualified borrowers of Beneficial can make use of the service is to ignore the words themselves. The Commission attempts to denigrate these examples because such forms were suggested by the Court of Appeals rather than by Beneficial (Petition at 8). Again, the Commission has misconstrued the applicable legal principles. The Court of Appeals recognized, as the Commission has not, that the appropriate standard by which to test any excision order is whether or not such order is reasonably related to curing the evil perceived and whether or not a less drastic remedy would suffice. In exemplifying possible permissible forms of advertising, the Court of Appeals merely pointed out to the Commission the fact that a less drastic remedy was available, which remedy the Commission failed fully to consider.

Indeed, the order of the Court of Appeals could have gone further. Under the applicable provisions of the Federal Trade Commission Act, 15 U. S. C. § 45(c), the Court of Appeals could have modified the excision order rather than remand the question of remedy to the Commission for its further consideration. See, *Grove Laboratories v. Federal Trade Commission*, 418 F. 2d 489 (5th Cir. 1969);

Carter Products, Inc. v. Federal Trade Commission, 186 F. 2d 821 (7th Cir. 1951); *Alberty v. Federal Trade Commission*, 186 F. 2d 36 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 818 (1950); *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509 (7th Cir. 1946); *D. D. D. Corp. v. Federal Trade Commission*, 125 F. 2d 679 (7th Cir. 1942).

There is an additional basis on which the decision of the Court of Appeals is demonstrably correct. The Administrative Law Judge decided that an excision order was required on the ground that Beneficial must purge itself of its alleged past misdeeds regarding its advertising and that the excision remedy was an appropriate exercise of the Commission's punitive powers (A133a). The Commission adopted this view (A36a).

In adopting that theory, the Commission erred since proceedings before the Commission are not punitive in nature and its remedies should not be adopted to punish. *Federal Trade Commission v. Gratz*, 253 U. S. 421, 432 (1920) [dissenting opinion of Mr. Justice Brandeis]; accord, *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 706 (1948) rehearing denied 334 U. S. 839 (1948); *Heater v. Federal Trade Commission*, 503 F. 2d 321, 324-25 (9th Cir. 1974).

Therefore, in view of the satisfactory alternatives to excision, a few of which the Court of Appeals suggested, and in view of the fact that the Commission has no authority to order punitive remedies, the Court of Appeals correctly applied settled principles of decisional law in remanding the question of remedy to the Commission for further consideration.

CONCLUSION.

The decision below does no more than require the Commission to exercise its discretion fully to explore the availability of alternative cease-and-desist provisions which do not go beyond the necessities of the case and do not unduly impinge on rights of protected speech. Whatever serious issues may arise from possible future Commission actions not now before this Court, they are not presented by this case. The remand ordered by the Court of Appeals was clearly correct on the record before it. For these reasons, it is respectfully submitted the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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